SUPREME COURT U.S.
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Supreme Court of the United States.

NO. 250.

MELISSA A. BARBOUR ET AL.

vs.

STEPHEN B. PRIEST, ASSIGNEE OF HUBBARD COLBY, A BANKRUPT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

ARGUMENT FOR APPELLANTS.

BY A. K. DUNN.

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STATEMENT OF THE CASE FOR APPELLANTS.

This suit is brought to set aside two mortgages made by the defendant, Hubbard Colby, to the respondent, Melissa A. Barbour, in her own behalf, and also as the guardian of Maggie Barbour and May Barbour, her two minor children, on the ground that said Hubbard Colby, at the time of executing said mortgages, was insolvent and contemplating bankruptcy, and intending to prefer said Melissa A. Barbour; and "that said Melissa A. Barbour then had reasonable cause to believe that said Hubbard Colby was insolvent and contemplating bankruptcy, * * * and knew that said Hubbard Colby, by said conveyances, intended a fraud upon the bankrupt act."

In the year 1864 or 1865, Hubbard Colby, the defendant, was appointed administrator on the estate of Justus S. Barbour, deceased, who was the husband of the respondent, Melissa A. Barbour, and the father of the said Maggie and May Barbour, gave bond as administrator and entered on the discharge of his duties as such administrator. Bently S. Runyan, Willard S. Hickox and Henry P. Davis were the sureties on said administration bond. (Printed record, pages 81, answer to 4th question, and 107, answer to 200th question.)

On the first day of October, A. D. 1873, said H. Colby had in his hands, as such administrator, of the assets of said estate, the sum of $24,594.82, (printed record, page 89, answer to 6th question,) and on that day executed the two mortgages mentioned to secure the payment of that sum to the said Melissa A. Barbour, as widow of decedent, and as the guardian of the minor children of herself and decedent, and on the same day left said mortgages with the Recorder of Richland County for record, and which were properly and duly recorded in the records of said county. (Printed record, pages 74 and 75, testimony of George A. Clugston.)

On the 5th day of November, A. D. 1873, proceedings were instituted by James A. Nichols against said Hubbard Colby to have him declared a bankrupt; and, on the 16th day of December, A. D. 1873, he was, under said proceedings, adjudicated a bankrupt, and the plaintiff was, on the 13th day of January, A. D. 1874, appointed his assignee in bankruptcy. (Printed record, page 2.)

Hubbard Colby continued to carry on and transact business as usual up to the time proceedings were commenced against him in bankruptcy, (printed record, page 89, answer to 13th question; page 106, answers to questions 185 to 194 inclusive,) meeting promptly every debt or claim presented to him for payment up to that time (printed record, page 107, answer to198th question; 115, answer to 253d question,); selling property and applying the proceeds thereof to the payment of his debts, (printed record, page 109, answer to 201z to 201zzz inclusive; page 111, answer to 202d question, and page 112, answer to 223d question,) and otherwise using the same in his business so long as he was not legally forbidden to do the same, at all times expressing his belief and confidence in his ability to pay all his debts; and, until the latter part of October, A. D. 1873, when he ascertained the extent of his liability on the paper of Willard S. Hickox, he had not entertained a doubt of his ability to do so, and even then, with his knowledge of that additional amount, before unknown to him, he thought if his creditors would permit him to manage his affairs uninterrupted by proceedings in bankruptcy, (printed record, page 89, answer to 13th question,) he would be able, as he expressed it, to "pull through." (Printed record, page 43.)

On the 29th day of September, A. D. 1873, the Probate Judge of Richland County sent, by the hands of his deputy, a note to Melissa A. Barbour, requiring her as the guardian of Maggie and May Barbour, her minor children, to file an account of her guardianship, and show thereby the amount of means in her hands as such guardian, and how the same was invested—referring to a notice he had sent on the 11th day of June, 1873, requiring her to file a new bond (Andrew Newman, one of her sureties, having died), and an account showing fully receipts and expenditures, distributive shares, and how invested—saying "you filed new bond in June, but no settlement. Please file it at once, to-day or to-morrow, and save costs." (Printed record, page 79, answers to 10th, 11th and 12th questions, and exhibits "A" and "B," on page 80.)

This notice Mrs. Barbour handed to Hubbard Colby on the day of its date, (printed record, page 80, answer to 13th question,) and requested him to attend to the matters therein mentioned. (Printed record, page 88, answer to 123d question.) Hubbard Colby and Willard S. Hickox were her sureties on her bond as guardian. (Printed record, page 90, answer to 17th question.)

On receipt of the notice of September 29th, 1873, Hubbard Colby made out his account with the estate of Justus S. Barbour, as administrator, to be filed in the Probate Court for settlement of said estate, and,

on the 1st day of October, 1873, executed the mortgages in controversy to secure the payment of the money remaining in his hands as such administrator. These mortgages were, on the same day of their execution, filed with the Recorder for record. (Printed record, page 75, Clugston's testimony, and page 90, answer to 16th question.)

Mrs. Barbour was the guardian of her children and required by the Probate Court to show by her accounts what funds of theirs she had in her hands and how they were invested, in order that the Court might know whether they were secure. (Printed record, page 80, exhibits "A" and "B.") If the funds were secured by mortgage on real estate, the demands of the law, as well as of the Probate Judge, were satisfied, and no further proceedings against the guardian would be had by the Probate Court. Hence Colby deemed it proper and prudent to execute mortgages for that purpose; and these proceedings by the Probate Court were the only cause moving to the making of the mortgages. Mrs. Barbour had expressed no fears as to the safety of the money to Colby, or to any other person; had made no demand for the money or for any security for it, (printed record, page 108, answer to question 201s; page 83, answer to 60th question,) and did not ask any security at the time the mortgages were given, (printed record, page 83, answer to 47th question,) for she thought the money perfectly safe in the hands of Colby, because she supposed he was worth from $150,000 to $300,000, and did not suppose he owed any other person but herself. (Printed record, page 80, answer to 16th question; page 81, answer to 13th question, and page 85, answer to 89th question.)

On hearing in the District Court, a decree was rendered against the assignee sustaining the validity of said mortgages, from which an appeal was taken by him to the Circuit Court, where a decree was rendered in favor of said assignee, setting aside said mortgages as fraudulent and void, from which latter decree an appeal was taken to this Court.

The Argument.

To invalidate the mortgages in question, it must appear to the satisfaction of the Court, from the evidence submitted in the case, that Hubbard Colby was, at the time of making the mortgages, (1) insolvent, (2) contemplating insolvency, or (3) intending to prefer a creditor. The existence of his insolvency is not alone sufficient to taint these conveyances. The grantor must have known, or believed, himself to be insolvent in order to lay the foundation for (2) his contemplating bankruptcy; for if he believed himself solvent at the time, he could not contemplate his insolvency or bankruptcy, and, therefore, could not be intending (3) to prefer Melissa A. Barbour by the mortgages; and he could not have intended thereby a fraud upon the bankrupt act unless he intended a preference thereby.

Insolvency

Has been variously defined in many decisions made by different Courts of the United States in proceedings in bankruptcy where the question has arisen for judicial determination, and their definitions are somewhat at variance with each other, and to some extent contradictory, notwithstanding which it seems to be admitted by the best considered cases, determined by the highest Courts, that it is not the same in regard to all persons or in reference to all places, in contemplation of the bankrupt act, but is a different thing in regard to different persons and in refer-

ence to different places. With the merchant and trader, one state of facts constitutes insolvency under the bankrupt act, while those not included in either of those two classes of persons would not, under like circumstances, be deemed insolvent; nor the same acts with regard to the latter be considered acts of bankruptcy, so, in like manner, a different rule is applied to those doing business in large cities from that laid down to regulate the conduct of those transacting business in smaller towns.

With the merchant and trader in the city, insolvency is held to be the inability to pay his debts in the ordinary course of business, in money, as they fall due. With those not engaged in trade or commerce, or doing business outside of large cities, the term insolvency has a less restricted meaning and less technical, conforming more nearly to the general and popular meaning of the term, that of insufficiency of entire property to pay debts. *Martin v. Toot*, 4 N. B. R., 458; *In re* Frederick E. Driggs, assignee of Tonkin & Trowartha v. Moore, Foot & Co., 3 N. B. R., 149–50; *Rison v. Knapp*, 4 N. B. R., 114–15; *In re* Gregg, 4 N. B. R., 150; *Doan v. Compton & Doan*, 2 N. B. R., 183, and *Tiffany v. Lucas*, 15 Wall., 410.

In this case the mortgagor, not having been a merchant, trader, or engaged in commerce in any large city, would perhaps more properly fall within the class embraced in the less restricted sense above named. But, I apprehend, it can make little difference in which class he may be placed, as, at the time of making the conveyances in question, no evidence existed of his insolvency under the restricted rule. And it is his condition, as the evidence then existing showed it to be, at the date of the execution of the conveyances, to which we are to look in order to fix the character of the conveyances, and not to what subsequent developments may have shown his financial condition to have been at the time of making the instruments.

Intent to Prefer.

The intention of the mortgagor to prefer is to be ascertained by exploring the circumstances surrounding him at the time of the execution of the instruments and preceding that time, and not by subsequent events; and this involves not alone his actual pecuniary condition at the time, independent of other circumstances, but includes his knowledge, then, of his affairs and his belief at the time as to his financial condition, for if he did not at that time have such knowledge of his pecuniary condition as to prevent him from entertaining the belief, fairly and reasonably, that he could meet his liabilities and pay all his debts, if permitted by his creditors to manage his own affairs, although subsequently he ascertained that he could not do so, yet the payments and conveyances made by him, prior to obtaining such information, would be valid under the bankrupt act. It is the intention of the grantor, formed in his mind prior to and entertained at the time of making the payments and conveyances, that give color and character to his acts. Therefore, if from the want of knowledge of the extent of his liabilities, he supposed he had ample means to meet all his indebtedness, he could not form in his mind the intent to prefer, for if he had means, as he supposed, to discharge all his liabilities, the conveyance made could not create a preference, and he could not be supposed to be contemplating a result which, it was clear to him, could not follow his act.

Colby had in his hands, as he supposed, (printed record, page 89, answer to 11th and 13th questions, and page 102, answer to 151st question,) at the date of the conveyances abundant property and means to

pay all his individual debts, had not the effects of the panic, realized after that period, depreciated values, obstructed financial operations and produced stagnation in all business to an extent before unknown in Mansfield. He had become liable on the paper of Hickox and on that of the M. & L. M. Railroad Company, but the railroad company had the means to discharge the paper on which he was liable for it, (printed record, page 103, answer to 151st question, and pages 68 and 69,) and his liability on the paper of Hickox had been contracted at a number of different times to different persons, most of which were past due and should have been lifted by Hickox before October 1st, 1873, and what portion of them was outstanding then was unknown to Colby with the exception of perhaps $5000 or $6000. (Printed record, page 89, answer to 12th question.) There is no evidence on this subject but that of Colby, and he is in no way contradicted in his statements. He tells us that he was not able to learn the extent of his liabilities with Hickox until sometime in the latter part of October, 1873. (Printed record, page 90, answer to 14th question.)

He had not failed to meet any claim on him, presented for payment, up to the latter part of October, 1873, when the claim of the party who filed the petition against him in bankruptcy was presented by that party for the purpose of demanding security on his claim (not, however, being a claim of Colby's, but of Hickox's on which Colby was surety), which was not then, nor for some time thereafter, due. His own creditors had not, up to that time, pressed him for payment or security. His knowledge of the extent of his liability on the paper of Hickox and the demand by Nichols, who filed the petition in bankruptcy, for security, occurred long after the making of the conveyances in question. (Printed record, page 89, answer to 13th question, and page 2.) In the meantime he had continued to carry on his business as usual from the 26th day of September, 1873, until the filing of the petition against him in bankruptcy, paying money, selling property, and discharging and securing debts with the proceeds of such sales. He sold property in Mansfield and in St. Louis, both real and personal, long after he had made these mortgages. He sold real estate in Mansfield and St. Louis to Dr. Jones, taking in payment therefor the note held by Jones on him, which was not due for some months, (printed record, page 106, answers to questions 185th to 192d inclusive,) and for the residue the note of Jones; collected debts and rents, (printed record, page 115, answer to 247th question, and page 112, answers to questions from 220th to 225th inclusive,) borrowed money, raised money on policies of insurance, and applied the money arising from all these sources to the payment of his debts and carrying on his business (printed record, pages 109, 110, 112 and 113); paid the Farmer's National Bank of Mansfield $8000 on his indebtedness to the bank, all of which was well known to the assignee as well as the public, thereby furnishing the most reliable evidence of the absence of any intent on his part to prefer any creditor or to commit any fraud on the bankrupt act. *In re* Greggs, 4 N. B. R., 150; *Jones v. Howland*, 8 Met., 377; *In re* Driggs v. Moore & Foote, 3 N. B. R., 149.

In re Greggs, 4 N. B. R., 450. *Supra*, the law on the subject of intent is correctly stated: "It is urged that to constitute an act of bankruptcy * * * it is necessary that the *intent* to give a preference should exist, and that this intent cannot be inferred from the mere fact of actual insolvency. The law on this point is well laid down in *Jones v. Howland*, 8 Met., 377. The result of the cases, says the Court, is the drawing of a distinction between the actual insolvency and a contemplated bankruptcy, between the payment of a just debt, in the

course of business though insolvency exists, and is known to the insolvent, and the design to give a preference in view of stopping payment. And in view of all the authorities we hold the law to be this: —that although insolvency exists, yet if the debtor honestly believes he shall be able to go on in his business, and with such a belief pays a just debt, without a design to give a preference, such payment is not fraudulent, though bankruptcy should afterwards ensue. And on the other hand, if the debtor being insolvent and knowing his situation and expecting to stop payment, shall then make a payment or give security to a creditor for a just debt, with a view to give him a preference over the general creditors, such payment or giving security is fraudulent as against the creditors * * * It rests upon the intent with which the act was done, and the intent is to be proved as a fact either by direct evidence or as a necessary and certain consequence of other facts clearly proved.' These observations are cited with approval in *Morgan, Root & Co. v. Mastick* 2 N. B. R., 163, and in *Doam v. Compton*, 2 B. R., 182, and the same principles are substantially laid down in numerous cases. *Farim v. Crawford*, 2 B. R., 181; *Wadsworth v. Treadwell*, 2 B. R., 101; *Langley v. Perry*, 2 B. R., 180."

Fraud Upon the Act.

In this case fraud upon the bankrupt act, such as to render the mortgages void and invalidate the security to the mortgagee, can consist only in the fact that the mortgagor made them with the intent to prefer, and that reasonable cause existed on the part of the grantee to believe a fraud was thereby intended. Nothing else as to these mortgages could be a fraud upon the act that would invalidate them.

Colby testifies that at the time he made these conveyances he considered himself solvent, and was the owner of property and effects largely in excess of his indebtedness then, and for some time thereafter known to him, (printed record, page 89, answer to 11th question,) and, therefore, there could not have been in his mind any intent to prefer, because, if his condition had been as he supposed it was, his act could not have created a fraudulent preference, and he cannot be supposed to have contemplated what, under the circumstances, could not have occurred. *Toof v. Martin*, 13 Wall., 40.

The intent of the grantor to commit a fraud upon the bankrupt act in making the conveyances must be shown by establishing the fact of his insolvency and his intent to prefer the grantee, which facts must be established by satisfactory evidence. *Wilson v. City Bank*, 17 Wall., 473; *In re* Williams & Williams, 3 N. B. R., 75, and *In re* Dunkle & Dreisbach, 7 N. B R., 78.

Reasonable Cause to Believe Insolvency.

Should it appear from the evidence that the grantor, at the time of making the conveyances, was, in contemplation of the bankrupt act, insolvent and intended by the conveyances to prefer the grantee, yet the existence of these facts alone does not invalidate the mortgages, but only necessitates inquiry as to the existence of reasonable cause on the part of the grantee to believe that the grantor was insolvent and intended to prefer the grantee, and intended thereby a fraud upon the bankrupt act. It is said by Lowell, J.: "I will only say that by our law a conveyance may be an act of bankruptcy in the grantors, although no fraudulent intent is known to or participated in by the grantee. * * *

It follows that an adjudication of bankruptcy does not *per se* affect the title of the purchaser, * * * and the Statute expressly says that if any person is adjudged a bankrupt for any conveyance, &c., the assignee may recover the property, provided the person receiving the payments or conveyance had reasonable cause to believe a fraud was intended, &c." *In re* Williams & Williams, 3 N. B. R., 74–75. Also, *in re* Dunkle & Dreisbach, 7 N. B. R., 78, it is said: "a preference being the act of bankruptcy, and indeed, as the preferred creditors are not parties to these proceedings, it would be unjust that the present proceeding should in any manner affect their interest, excepting so far as it fixes the status of D. as a bankrupt. If these debtors shall be declared bankrupts and the assignee * * * shall bring an action * * * nothing that has transpired here * * * will in any manner whatever * * * affect any question that will be involved in any such suit"

This reasonable cause, like the term insolvency, has been variously defined in different adjudicated cases. In the case of *Toof v. Martin*, 13 Wall., 40, the Court said: "A reasonable cause they must have been considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led a prudent business man to the conclusion that they could not meet their obligations as they matured in the ordinary course of business."

In all cases adjudicated, so far as I have been able to discover, where the Court found that reasonable cause to believe the debtor insolvent did exist, the payments had been made, or security given on claims that had been long overdue, where the creditors had been pressing the debtor for payment or security, and which, in most cases, had been refused and the creditor made aware of the inability of the debtor to meet his liabilities, and after such facts were made known, had prevailed on the debtor to make payments, transfers of goods, or conveyances of property. Such were the facts in the following cases:

In re Gregg, 4 N. B. R., 150; *Foster v. Hackley & Sons*, 2 N. B. R., 131; *Graham v. Stark*, 3 N. B. R., 93 (3 B. R., 357); *In re* Arnold, 2 N. B. R., 62 (2 B. R., 160); *White v. Raferty*, 3 N. B. R., 53 (3 B. R., 221; *Merchants' Nat. Bank of Hastings v. Truax*, 1 N. B. R., 146 (1 B. R., 545); *Toof v. Martin*, 6 N. B. R., 49; s. c., 13 Wall., 40; *Wager v. Hall*, 5 N. B. R., 181 (5 B. R., 181); *Scammon v. Cole*, 5 N. B. R., 257; *Buchanan v. Smith*, 16 Wall., 277; s. c., 7 N. B. R., 513; *Forsythe v. Murtha*, 7 N. B. R., 174; *In re* Palmer, 3 N. B. R., 74 (3 B. R., 283); *North v. House*, 6 N. B. R., 365; *Wilson v. Stoddard*, 4 N. B. R., 76 (4 B. R., 254); *Driggs v. Moore, Foot & Co.*, 3 N. B. R., 149 (3 B. R. 602); *Campbell v. The Trader's Nat. Bank of Chicago*, 3 N. B. R., 124; same case appealed, 6 N. B. R., 353, and 14 Wall., 87; *Grow v. Ballard et al.*, 2 N. B. R., 69 (2 B. R., 643); *Brock v. Tenell*, 2 N. B. R., 190 (2 B. R., 643;) *Davis & Green v. Armstrong*, 3 N. B. R., 7 (3 B. R., 643); *In re* Bachelder, 3 N. B. R., 37 (3 B. R., 150); *Cookingham v. Morgan*, 5 N. B. R., 16 (s. c., 7 Blatchford, 480); *Warren v. Del. L. & Western R'y Co.*, 7 N. B. R., 451; *Warren v. Tenth Nat. Bank*, 7 N. B. R., 481.

Such facts as existed in the foregoing cases having been brought to the notice of the creditor, it was held, furnished reasonable cause to believe the debtor insolvent, and the creditor taking payment or security for his debt, with the knowledge of such facts, would have reasonable cause to believe that a preference would be thereby created, unless made under some arrangement whereby it could be reasonably expected that the debtor would be able to continue his business and meet his liabilities.

Reasonable cause to believe the insolvency of the grantor is based

upon the existence of such or similar facts as are set forth in the statement of the cases last cited, *known* to the creditor at the time the conveyance is made. But, in the absence thereof, it is clear that reasonable cause to believe the insolvency of the grantor could not have existed in the mind of the grantee, and it could not have been supplied by such reports, rumors and circumstances as might have aroused a suspicion of an inability to pay, or created an anxiety and a desire to have a debt secured. There is a distinction between having reasonable cause to *believe* and reasonable cause to *suspect*.

In Grant v. National Bank, 97 U. S. S. C. Rep., 80–81, Bradley, J., said: "Some confusion exists as to the meaning of the phrase 'having reasonable cause to believe such a person is insolvent.' Dicta are not wanting which assume that it has the same meaning as if it had read 'having reasonable cause to suspect such a person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure.

It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances and yet have no cause for a well grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt under such circumstances, is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside, and yet this could be done in a large proportion of cases if mere grounds of suspicion of their insolvency were sufficient for this purpose.

The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate, and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided. Hence the act very wisely, as we think, instead of making a payment or a security void, for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

The testimony taken in this case utterly fails to disclose the existence, on the first day of October, 1873, of facts, or any fact, constituting any evidence, to any one, of Colby's insolvency at that time, either under the broader or more restricted rule, but does, in fact, negative the existence of any such evidence. His reputation for solvency was untarnished by a single whisper prior to the 26th day of September, 1873, so far from it that he was estimated by the community in which he lived

and did business to be a solvent and wealthy man, which a reference to the testimony will show:

Vide testimony of Mrs. Barbour, page 80, printed record.
" " " Scattergood, " 118, " "
" " " G. W. Blymer, " 120, " "
" " " Wm. B. Mercer, " 122, " "
" " " W. H. Harris, " 124, " "
" " " Thos. Shumway, " 125, " "
" " " John Wood, " 127, " "
" " " H. Harroon, " 128, " "
" " " Jos. Black, " 129, " "
" " " Henry P. Davis, " 131, " "

All of which is uncontradicted by any one witness in the case.

His reputation we find then, from all the testimony in the case, was good and unimpaired until the failure of the First National Bank, at 2 o'clock p. m, Friday, the 26th day of September, 1873, so good that on the morning of that day he borrowed of Allen B. Beverstock $10,000 in United States bonds. (Printed record, page 111, answer to 203d question)

On the first day of October, four days having intervened between the failure of the bank and the execution of the mortgages, it is claimed that the reputation of Colby as to solvency had become impaired to such an extent that, under the bankrupt act, all his creditors were prohibited from receiving payment or security from him on their claims. The evidence produced and relied on by the complainant to sustain this proposition, consists entirely of rumors, suspicions and talks about the streets, the origin and time of occurrence of which are involved in much uncertainty, though very satisfactorily shown not to have been heard of until considerable time later than the first day of October, 1873, the time when the conveyances in controversy were made.

Over thirty witnesses were introduced by the complainant and inquired of in regard to those rumors, suspicions and street talks, of whom seventeen are uncertain as to the time when they first heard them or any reports unfavorable to the financial condition of Colby, and seven of them are certain it was ten days to three weeks after the 26th day of September, 1873, before they heard any such reports, and all of them, with three or four exceptions, testify that the reports they heard were based upon, and grew out of, Colby's liability on the paper of Hickox. But the evidence is conclusive that his liability on the paper of Hickox was not ascertained and publicly known until some days after the first day of October, so that it is apparent no such rumors could have been in circulation until after the conveyances had been executed. Upon the complainant's own showing there is a failure to establish the fact of the existence of such rumors as are claimed. To put the matter beyond question, the respondent examined nine witnesses, residents of Mansfield and who resided there at the time of the bank failure and up to the time of giving their depositions, and were, during the whole time doing business around the public square and had been so engaged for a long time prior to the bank failure, were conversant with the community, had heard the failure and matters connected therewith talked of, mingled in the community, and had heard the same rumors testified about by complainant's witnesses, and swore positively and unequivocally that those rumors were not talked of until a number of days after the first day of October, 1873.

Thus we have of the business men of Mansfield, introduced by both parties, 16 who testify positively that those reports were not heard until after the date of the mortgages, while we have 17 who are uncertain as

to the time, and 5 or 6 who testify that the reports were heard by them at an earlier date, but at the same time tell us that the reports were based on facts conclusively shown, in the testimony, to have been unknown to the public until after the first day of October, 1873, whereby it is apparent that these four or five witnesses were mistaken as to the time they heard the reports to which they have testified. But if such rumors were in circulation in Mansfield between the 26th day of September and first day of October, 1873, there is no evidence showing that they came to the knowledge of Mrs. Barbour, in any way, and all presumption to that effect is rebutted by the positive testimony of Mrs. Barbour that she had not heard of them from any one, and that she had no suspicion herself of anything being wrong in the financial affairs of Colby.

To invalidate these mortgages it must appear that the grantee had reasonable cause to believe not only that the grantor was, at the time of making them, insolvent, but also that he intended thereby (1) to prefer her to his other creditors and (2) intended to commit a fraud upon the bankrupt act. If she did not know of, and had no reasonable cause to believe, the insolvency of the grantor, she could have no reasonable cause to believe that he intended, by the conveyances, to give her a preference, as no preference could arise from his act unless he was insolvent under the broader or more restricted definition of insolvency.

It may be fairly deduced from the decisions of the Courts in adjudicated cases herein cited, as the general and well settled principle controlling the conduct of a debtor and those dealing with him, that the payments, conveyances, &c., made or entered into by the debtor are valid, under the bankrupt act, where they have been executed prior to the time when the debtor had furnished evidence to the public, or those with whom he deals, of his insolvency by some personal disclosure to them, or by not meeting his debts as they mature in the ordinary course of business. If a debtor has met all his obligations, as they became due and were demanded of him, any creditor would have the right to receive payment or security from him, unless in some other way advised of his debtor's insolvency. In this case there is no evidence of any failure to meet all paper maturing and demanded of the grantor until after the date of the conveyances a number of days,—nearly a month,—nor indeed until the proceedings to have him declared a bankrupt were commenced in the United States District Court; and those proceedings were instituted, not by a creditor whose claim was past due and had been demanded, but by the holder of a claim which was not due for several months after the filing of the petition in bankruptcy, and on which he was only a surety of W. S. Hickox. (Printed record, page 89, answer to 13th question.) No statement whatever of his financial condition had been made, by him or any other person, to Mrs. Barbour. The only thing relied upon as affording reasonable cause to believe, on her part, that Colby was insolvent and intended a preference to her and thereby to commit a fraud on the bankrupt act is the claim that rumors and reports were in general circulation in Mansfield that the failure of Hickox would embarrass Colby. This kind of testimony is said to be, "in general, weak evidence, and when it is admitted, it is the duty of the Judge to impress on the minds of the jury how little conclusive it ought to be, lest it should have more weight with them than it ought to have, per Lord Ellenborough, 1 M. & S., 686; 1 Starkie on Evidence, 31–32, note (1), *Wick v. Spark*, 1 M. & S., 686; Ib. 30, note (Z)."

It is not every transfer, payment, or conveyance made by an insolvent debtor that is void under the bankrupt act as against the party

receiving it, even when there is reasonable ground for believing insolvency, but only where there is reasonable ground to believe both insolvency and an intention to prefer. In the case of *Wadsworth v. Tyler*, 2 N. B. R., 101-2, Shipman, J., said: "It will be seen at a glance that the 35th section renders the transfer of the property of the insolvent void only when the party benefitted by such transfer, or receiving it, has reason to believe both that the debtor is insolvent *and* that a fraud on this act was intended. * * *

In this section, purchasers who are strangers, and creditors who receive the property of the insolvent in payment or part payment of debts, are placed upon the same footing." *Vide* also *Shaffer v. Fritchey & Thomas*, 4 N. B. R., 179–80; *Golson et al. v. Neihoff et al.*, 5 N. B. R., 56–8–9; s. c., 2 *Biss.*, 454; *Bartholow v. Rean*, 18 Wall, 635; *Tiffany v. Lucas*, 15 Wall., 410, and *In re* Dibble *et al.*, 2 N. B. R., 185.

RUMORS.

The testimony in regard to rumors of Colby's insolvency has been referred to above, from which it is clear no such rumors were in circulation at the time of executing the mortgages, nor for some days thereafter; but even if these rumors had been in existence and had been brought to the knowledge of the grantee and she thereby induced to make inquiry in regard to the truth of them, or the financial standing of Colby, what would have been the result? There is nothing in this evidence that shows that she could, by the most diligent investigation of the circumstances made known or accessible to her, have ascertained on the first day of October, 1873, any single fact that would have been evidence to her, or any other person, of the insolvency or probable insolvency of Colby. No witness has testified that at that time there was anything leading to the suspicion of his credit or solvency, except his liability for Hickox, the amount of which was not ascertainable on that day, and was not ascertained for some days thereafter, so that any inquiry she might have made would not have resulted in any information to her of any fact constituting reasonable ground for a belief of his insolvency.

As an intent to prefer cannot exist unless the grantor is insolvent, and knows the fact of his insolvency, so reasonable cause to believe such intent on the part of the grantor, by the grantee, cannot exist unless there is reasonable cause to believe the insolvency of the grantor; nor does it necessarily follow, from the existence of insolvency and reasonable cause to believe it, that the grantee has reasonable cause to believe the grantor intended a preference. Although the grantor may be insolvent, he may make a payment to a creditor or a conveyance to secure him without intending to prefer him, as where the debtor makes a partial payment to his creditor or a conveyance to procure time in which he may be enabled to convert property and means into money wherewith to meet other debts as they mature, as well as to discharge those partially paid or secured. *Vide Castle, assignee, v. Lee*, 11 N. B. R., 80–81, where it is said by Nelson, J.: "The assignee brings this action to recover from Lee, on account of a fraudulent preference, and in order to establish his asserted right must prove, not only the fact of insolvency on the part of the bankrupt, and a preference to the creditor by the transaction, having reasonable cause to believe the insolvency of the debtor, but must also show that the creditor has reasonable cause to believe the transaction was in fraud of the bankrupt act."

An intent to prefer is not to be inferred from the making a payment or conveyance, and the creditor receiving the payment or conveyance

cannot be held to have reasonable cause to believe a preference was intended, when no such intent existed in the mind of the grantor. It is not enough that such payment or conveyance may afterwards have operated as a preference to the creditor, but the intent must have existed, at the time of the payment or conveyance, in the mind of the bankrupt; and whether such intent existed or not at the time of making the payment or conveyance is to be ascertained from all the conditions and circumstances connected with the affairs and conduct of the bankrupt at the time, and not by those arising subsequently. From the testimony, it is evident that Colby did not know, on the first day of October, 1873, the extent of his liability for Hickox, and also that he intended to pay all his debts and continue his business. On the 26th day of September, 1873, at 2 o'clock p. m., the First National Bank closed its doors and thereby a financial panic was created in Mansfield, the effects of which could not be foretold, and were not known on the first day of October. The remaining banks of the place, immediately after the failure of the First National, entered into an arrangement whereby no one, not even depositors, could obtain from any one of them a sum exceeding $50 in any one day, and no discounts could be had of any paper whatever; and, under those circumstances, it became every man owing money to see to it that his affairs were so arranged as to require the least amount of ready money possible to meet his obligations. To allay demands for immediate payment of money, from any source they might arise, was one of the important things to do, and thereby obtain time to convert property into money and otherwise to procure ready means to meet such claims as might be demanded. It does not appear that Colby was called on, up to and long after the execution of these mortgages, for any debt due from him that he did meet promptly.

On the 29th day of September, 1873, the proper legal authority, constituted by the laws of the State for that purpose, sent a notice, in writing, to Mrs. Barbour requiring her to make to the Court a statement of the funds in her hands as the guardian of her children. These funds arose out of the estate of her deceased husband, of which Colby was the administrator and had the funds in his hands as such administrator. This notice was, on the same day it was received, placed by Mrs. Barbour in the hands of Colby with the request that he would have the matter to which it referred attended to. (Printed record, page 80.) Colby was aware that the law required the guardian to have these funds secured by bonds of the Government or by mortgage on real estate, and, because the Probate Court had required it, and that the guardian might have the kind of security for the money she was required to have for the funds due to her as guardian, he executed the conveyances in controversy, and included therein the amount due to her as widow, as the exact amount due to each was not altogether certain. Hence, under these circumstances, it is a fair inference that to comply with the notice of the Probate Court to Mrs. Barbour was the immediate and moving cause to the execution of the mortgages, and not an intent to create a preference in favor of the mortgagee. Mrs. Barbour had not asked of Colby the payment of the money due to her from the estate of her deceased husband, had not sought of him any security therefor by mortgage or otherwise, (printed record, page 83, answer to 47th question,) had no fears as to the safety of it, and had got of him money whenever she asked it, (printed record, page 86, answer to 99th question,) and had not, in any way, mentioned the subject or brought it to his notice, except as it was done by presenting him with the notice she had received from the Probate Court with the request that he would attend to the matter and do

what was necessary to be done in regard to it. How then could any suspicion have been excited in her mind by the execution of these conveyances of the insolvency of Colby or of his intention thereby to commit a fraud upon the bankrupt act?

Neither is it a case in which the mortgagee could be charged constructively. The law on this point is well settled. In Sugden on Vendors, 1040, it is said: "Vague reports from persons not interested in the property, will not affect the purchaser's conscience."

In *Jones v. Smith*, 1 Hare, 43, the Vice Chancellor said: "If there is no fraudulent turning away from a knowledge of the facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to the purchaser, then the doctrine of constructive notice will not apply —then the purchaser will in equity be considered, as in fact he is, a *bona fide* purchaser without notice."

Judge Story says; "There is no case that goes the length of saying that a failure of the utmost circumspection shall have the effect of postponing a party, as if he were guilty of fraud or had actual notice." 1 Story's Eq., Sec. 400.

The relations in life and to business transactions are also proper matters of consideration for the Court. Mrs. Barbour was unaccustomed to business, (printed record, page 50,) and would not, therefore, have her suspcions aroused as readily as those who were so accustomed.

Notwithstanding the Court might find the transaction on the part of Colby was an intended preference and a fraud upon the bankrupt act, yet the entire absence on the part of Mrs. Barbour of any knowledge of the embarrassed condition of Colby's affairs, her entire confidence in his ability to pay her, and the promptness with which he paid her money when asked for it, (printed record, page 81, answer to question 11, and page 86, answer to question 99,) precludes the idea that she reasonably could have believed, from the information she had, that he was insolvent or intended by the conveyances to prefer her and commit a fraud upon the act; and because of the complete absence of all fraud or fraudulent intent, on her part, these mortgages are valid liens in her favor. This view is maintained in the case of a sale *In re* J. D. Hunt, 2 N. B. R., 166–168, where it is said, by Bullock, J.: "Cases may occur of sales involving all the elements of fraud, so far as the vendor is concerned, and yet stand by the palpable presence of good faith in the vendee."

It is apparent that, at the time conveyances in controversy were executed, not a single element necessary, under the bankrupt act, to render them void existed on the part of Mrs. Barbour, whatever may have been the case in regard to Colby.

Amendatory Act of June 22nd, 1874.

Thus far I have argued the case under the provisions of the bankrupt act as originally passed and before the amendatory act of June 22d, 1874.

By the amendment of June 22d, 1874, the position the mortgagee, payee, or transferee sustained to the transaction was changed, and although reasonable cause to believe the insolvency, the intent to prefer, and the intent to commit a fraud upon the bankrupt act existed, yet in addition thereto it becomes, by virtue of that amendment, necessary that the payee or mortgagee should *know* that the bankrupt intended a fraud upon the act. In the original act the words were: "the person receiving such payment or conveyance * * * having reasonable cause to believe

such person is insolvent, and that * * * such payment * * * or conveyance is made in fraud of the provisions of this act." By the amendment the word "knowing" was inserted before the word "that" and after the word "and," making the clause read: "having reasonable cause to believe such person is insolvent, and *knowing* that such payment * * * or conveyance is made in fraud of the provisions of this act."

The bill of complainant is framed under the act as amended June 22d, 1874, and contains the averment: "that at said time the said Melissa A. Barbour *knew* that said Hubbard Colby, by said conveyance and pledge of said real estate, intended a fraud upon said bankrupt act, and that said conditional conveyance, pledge, and transfer was so made in fraud of the provisions of said act." (Printed record, page 3.)

There is no evidence in the case tending to prove that allegation, and it will not be claimed that there is any testimony that sustains that averment.

It is claimed to avoid the force and effect of the word *knowing* in the amended act on two grounds:

First. That the amendment does not apply to transactions which took place before June 22d, 1874, but only to transactions subsequent to that time.

Second. That if it does apply in cases brought after June 22d, 1874, to transactions occurring before, the insertion of the word "knowing" in the original sections is verbal only, and made no change in the legal effect thereof.

The first question that presents itself is, when is a case instituted or pending within the meaning of the amendment of June 22d, 1874, whether at the time proceedings are commenced by creditors to have the debtor adjudicated a bankrupt, or when suit is instituted by the assignee of the bankrupt to have the conveyance set aside? The language of the Statute is: "And the provisions of this act shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, 1873, as well as those commenced hereafter." The proper construction of which is, that in all proceedings where creditors have compelled the debtor into bankruptcy and the assignee of the bankrupt has commenced a suit against a creditor to set aside a conveyance as fraudulent, under the bankrupt act, since the first day of December, 1873, the said provisions shall apply—that in all cases commenced since the first day of December, 1873, by assignees of bankrupts, where the party has been adjudicated a bankrupt on application of his creditors, the said provisions shall apply.

And this is the view expressed by Treat, J., in the case of *Singer vs. Sloan, Supra*, in speaking of the case of *Hamlin vs. Pettibone*, where he says: "The amended section, 39, by its terms, covers all compulsory cases from December 1, 1873, and in that opinion, although the point is not decided, perhaps, yet it is strongly intimated that a distinction exists between two cases brought by *assignees* of voluntary and involuntary bankrupts. The case before him required for this decision this important point, viz.: whether in an involuntary case, where an adjudication had been had, *and a suit by the assignee was pending against a preferred creditor, prior to December* 1, 1873, the amendment had any application. That point he decided in the negative?" Nothing but a suit pending by the assignee prior to December 1, 1873, can prevent the amendment from operating.

The proceedings to have a debtor declared a bankrupt do not, by the determination that the conveyance made was an act of bankruptcy, conclude the right of the party accepting the conveyance, but the rights of such grantee must be determined in a separate suit prosecuted by the

assignee against such grantee. *Vide in re* Williams & Williams, 3 N. B. R., 74--75, and *in re* Dunkle & Driesbach, 7 N. B. R., 78. *Supra*, page 7.

In the case of *Booth, assignee, vs. Brook, Neely & Co.*, 12 N. B. R., 398–401, the bankrupt had executed a mortgage on January 31st, 1874, and prior to June 22d, 1874, had been adjudicated a bankrupt, and a suit was commenced by his assignee in bankruptcy to set aside said mortgage. In disposing of the case Hill, J., said:

"The first case decided by me under this amendment, was a motion made by defendant's counsel to set aside the adjudication of bankruptcy of these bankrupts, on the ground of the retroactive operation provided in this amendment. I then decided that as the decree of bankruptcy had been made, and rights vested under it, that the Congress had no power to disturb the decree, but in all cases where rights had not been fixed by the decrees of the Court, that all the modifications contained in the act would be given the retroactive effect. And, hence, where conveyances were good at common law, and only void under the provisions of the Bankrupt Act, it was competent for Congress to repeal the law, modify, or change it, and such change will be enforced by the Courts in all cases where rights were not, before the enactment, fixed and settled. The invalidity of this conveyance not having been declared by the proper tribunal before the passage of the amendment, and not being void by the common law, must be tested by the law as amended."

Also in the case of *Singer, assignee of Towle, vs. Sloan et al.*, 11 N. B. R., 433–7, Treat, J., said:

"The amendatory Statute, like all others of a similar character, which in some of its provisions is retroactive, involves necessarily many doubtful and complicated questions. It has been held, and must in this circuit be considered as settled, that although all compulsory cases are, by the express terms of the act, if instituted after December 1, 1873, subject to its provisions, yet they are not so subject as to adjudications had therein prior to the date of the amendatory act. Those decisions extend no further than that *previous adjudications* are valid. As to the many other and incidental questions arising, there are no authoritative expositions or decisions."

In the case at bar, the bill to set aside said mortgages was not filed until the 3rd day of August, 1874 (printed record, page 1), so that the invalidity thereof must be tested by the law as amended June 22nd, 1874. *Booth vs. Brook, Supra; Singer vs. Sloan et al., Supra;* s. c., 12 N. B. R., 208–210, on appeal to Circuit Court. In the last named case a petition in bankruptcy was filed against the debtor on the 21st day of January, 1874, and on February 3rd he was adjudged a bankrupt. On the 18th day of December, 1873, the bankrupt had executed a deed of trust to the defendant. On the 9th day of December, 1874, the assignee of the bankrupt filed a bill to have said deed set aside on the ground that the grantee had reasonable cause to believe, etc. The defendant demurred to the bill on the ground that it should allege, in conformity with Section 11 of the amendment of June 22nd, 1874, that the defendant *knew* a fraud on the act was intended. The demurrer was sustained, and in disposing of the case, Dillon, J., said:

"However it may be as to cases like the present, brought under Section 35, *pending* at the time the amended act of June 22nd went into operation, I am very clear in the opinion that the provisions of Section 11, amending Section 35, apply to all cases of this character commenced after that time, although relating to transactions which occurred before.

"I do not wish, however, to be understood as conceding that Section 11 does not apply to cases pending and undetermined when the amended

act went into effect. It is unnecessary to examine that question, and I give no opinion upon it. It is to be borne in mind that this suit is one to enforce a right of action which was wholly given by statute, and to invalidate a security which was good on the general principles of law, and only bad because of an express provision of the Statute.

"If the change in Section 35, made by the new Section 11, is *remedial*, then the general rule is undoubtedly as expressed by Mr. Justice Miller, *In re* King (10 B. R., 566), that its provisions do apply to pending cases (and, *a fortiori*, to future cases), unless there is something to show that the Legislature intended to exclude them.

"And even if an action resting upon Section 35 be considered a *right*, as distinguished from a *remedy*, still the general rule is that rights wholly given by a statute, are taken away by its unconditional repeal, and particularly as to cases not commenced when the repealing statute took effect. Sedgwick Const. and St. Law, 129 [108] *et Seq.*

"There is much in the known history of the amendatory act to fortify the legal presumption, above mentioned, as to the effect of repealing Statutes."

In discussing the subject, the learned author last cited, by way of illustrating and enforcing the view above suggested, by authority of adjudicated cases, says: "Thus, in Pennsylvania, where an act was passed authorizing the opening of a street in Pittsburgh and pending proceedings for the assessment of damages, it was held that the repeal of the act before the street was opened, rendered void all proceedings taken, and that the parties in whose favor damages had been assessed could not secure the compensation reported in their favor. So in New York, in May, 1837, a law was passed authorizing mortgage debtors to redeem their property sold under foreclosure decrees, within one year from the date of sale. In April, 1838, an act was passed repealing the act of 1837, to take effect in November, 1838. In a case where the sale took place in December, 1837, before the repealing law had passed, it was held that no redemption could take place after the time fixed for the act to go into effect; that the right of redemption was a mere inchoate right and necessarily destroyed by the abrogation of the statute which conferred it." Id., 112.

As to the second proposition, that the phrase "reasonable cause to believe" and the term "knowing" are equivalent, it is said in the case of *Singer, assignee, vs. Sloan et al., Supra*, by Treat, J.: "The broad distinction, however, between 'knowledge' and 'reasonable cause to believe,' if not apparent on a simple repetition of the terms, has been too well recognized by many decisions, even of the United States Supreme Court, to be ignored.

"See *Foster vs. Hackley*, 2 N. B. R., 406; *Graham vs. Stark*, 3 *Id.*, 357; *In re J. B. Wright*, 2 *Id.*, 490; *In re Arnold*, 2 *Id.*, 160; *White vs. Rafferty*, 3 *Id.*, 221; *Merch. Nat. Bank vs. Truax*, 1 *Id.*, 545; *Forbes vs. Howe*, 102 Mass., 427; *Scammon vs. Cole*, 3 N. B. R., 393; *Tiffany vs. Lucas*, 1 Dillon, 166; same, 15 Wall., 410; s. c., 8 N. B. R., 49; *Buchanan vs. Smith*, 16 Wall., 277; s. c., 7 N. B. R., 513; *Walburn vs. Babbit*, 16 Wall., 577; s. c., 9 N. B R., 1; *Toof vs. Martin*, 13 Wall., 40; s. c., 6 N. B. R., 49. Indeed, the marked distinction runs through nearly every case; and generally has been the point on which the case turned. Besides, the amendment is supposed to effect a needed change, and in the light of the then existing decisions, the change made is serious and important. It will, in cases at law, devolve on the jurors the duty to find that *knowledge* existed, and not merely reasonable cause to believe a fact to be ascertained by them. It cannot be held that a man *knows* a fact, when there exist only suspicions or surrounding circumstances, which, if thoroughly investigated, might

discover the truth. * * * It is apprehended that far more is now required. The rule, as it previously stood, was somewhat vague and uncertain. Often it occurred that, on precisely the same testimony, two jurors would reach directly opposite conclusions, even when the Court carefully defined the meaning of the phrase.

"Congress, being aware of the stringency of the legal construction given, and desiring to remove so stringent and somewhat arbitrary a rule, amended the law in order to affect only such transactions as are evidently *mala fide*—that is, such as are tainted with actual *knowledge*."

In the same case which was appealed to the Circuit Court, and is reported in 12 N. B. R., 205–210, in disposing of the demurrer it is said by Dillon, J.: "The counsel for the assignee makes the further point that 'having a reasonable cause to believe,' and 'knowing,' are, in contemplation of law, identical, and the averment of the former is legally equivalent to the averment of the latter; in other words, that Congress by carefully requiring the word 'knowing' to be three times inserted in Section 35, and by changing Section 39 in this respect to conform to the change made in Section 35, meant nothing and accomplished nothing. I cannot agree to that view. The intention of Congress is to be sought, and this is best done by looking at the original Section 35 and the decisions construeing it, and then at the amendments made by Congress.

"The courts had generally, I think I may say universally, held that Section 35 was contravened, if the creditor or other person had reasonable cause to believe a fraud on the act was intended, although he did not know it; that the inquiry was not what he actually knew, but what he had reasonable ground to believe. Many of the cases on this point are cited in the opinion of the District Judge, and I need not refer to them at length.

"Now the main scope of the act of June 22, is to relieve the severe features and rigorous operation of the original act, and the amendment of Section 35 was one of the changes of that character. Where reasonable cause to believe that a fraud on the act was intended, was before sufficient, *knowledge* of that fact is now required."

A Trust Fund.

The mortgages in this case were made to secure a trust fund in the hands of the bankrupt as the administrator of an estate, and principally to be paid over to another trustee whose duty, among other things, it was to hold it as the guardian of minor children and to invest it in the manner provided by the Statute of the State of Ohio above referred to, viz: Volume 69, O. L., page 56, passed March 26th, 1872: "*Seventh.*—To loan or invest the money of his ward in a reasonable time after he receives it, and the payment of the money loaned or invested shall be secured by a mortgage on real estate of double the value of the money loaned, exclusive of buildings or improvements, timber and minerals in or upon such real estate, or upon the purchase or pledge of the certificates of the funded debt of this State, or the bonds or certificates of the funded debt of the United States;" and which will be found substantially embraced in the Revised Satutes of Ohio, 1880, § 6269, and a reference to above named volume and page.

The money thus secured was no part of the estate of the bankrupt to which his creditors were entitled, and he, in making the transfer of the property to the guardian, did nothing more than he was, by the law and in conscience, bound to do, and did not thereby defraud his creditors or in any way impair their rights.

A distinction is to be observed in the obtaining of a lien on the estate of a bankrupt for trust funds of the character of those herein and other claims, as has been held by a Court whose decisions are worthy of consideration. A bond was given by an administrator for the faithful discharge of his duties as such trustee, which, by the Statute of the State of Indiana, became a lien on all the estate of the administrator from the day a suit was commenced upon it. A suit was commenced on such bond on the 27th day of April, 1876, in the State Court, and the administrator who executed the bond was adjudicated a bankrupt under a petition filed on the 6th day of June, 1876, and an assignee was appointed for his estate. Judgment was not recovered in the suit upon the bond against the bankrupt until after the petition in bankruptcy was filed, and the question in the case was, whether the assignee of the bankrupt was entitled to the property or the parties interested in the bond of the administrator. It was held by the United States District Court for Indiana that the creditors under the bond had priority over the assignee in bankruptcy. On appeal to the United States Circuit Court for the District of Indiana, Drummond, J., affirmed the judgment of the District Court. *Voyles, assignee, vs. Parker*, reported in *Chicago Legal News*, October 23rd, 1880.

In every aspect of this case the appellants are innocent of any violation of the bankrupt act, and are, therefore, entitled in justice and equity to have the validity of their mortgages affirmed.

A. K. Dunn,
Counsel for Appellants.

OFFICE SUPREME COURT U. S.
FILED
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JAMES H. McKENNEY, Clerk.

Supreme Court of United States.

No. 250.

MELLISSA A. BARBOUR, A. K DUNN, GUARDIAN OF MAGGIE BARBOUR AND MAY BARBOUR, APPELLANTS,

vs.

STEPHEN B. PRIEST, ASSIGNEE OF HUBBARD COLBY, A BANKRUPT, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF OF N. N. LEYMAN, SOLICITOR FOR APPELLEE.

GEO. H. WINTERS, BOOK AND JOB PRINTER, MANSFIELD, O.

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STEPHEN B. PRIEST, ASSIGNEE, OF HUBBARD COLBY, A BANKRUPT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF OF N. N. LEYMAN, SOLICITOR FOR APPELLEE.

STATEMENT OF THE CASE.

Hubbard Colby, of Mansfield, Ohio, was adjudicated a bankrupt on the 16th day of December, 1873.

Stephen B. Sturges was elected and qualified as assignee of the estate of said bankrupt, and filed the original Bill in Chancery in the District Court of the United States for the Northern District of Ohio, against Mellissa Barbour, one of the appellants, and against her as guardian of May and Maggie Barbour, as well as others claiming mortgage liens upon the most valuable portion of the real estate of the bankrupt, alleging that the mortgages to said Mellissa A. Barbour and to Allen B. Beverstock were given in fraud of the provisions of the bankrupt Act.

This appeal relates only to the mortgages asserted by said Mellissa A. Barbour for herself, and by A. K. Dunn, guardian of the minors, May and Maggie Barbour, as successor in the trust to Mrs. Barbour.

The District Court sustained the mortgages. An appeal was taken to the Circuit Court, which set aside said mortgages and decreed them void, as against complainant below. This appeal renews the question as to the validity of the mortgages under the bankrupt act. The rights of A. K. Dunn, guardian, are to be determined upon the same facts, and by the same rules of law, as those of Mrs. Barbour; as she represented the minors at the time of the execution and delivery of the mortgages in question. Stephen B. Priest, appellee, is successor in office to Stephen B. Sturges, assignee of the bankrupt.

The acts complained of, and facts relied on, transpired, and the adjudication of bankruptcy was entered, prior to December, 1873; hence, the rights of the parties are governed by the bankrupt act then in force, and not by the amended act of 1874.

The mortgages bear date October 1st, 1873; were executed at the same time, as part of the same transactions; and the conditions of defeasance were the same, viz:

"That, whereas, said Hubbard Colby has been and now is admin-"istrator of Justus S. Barbour, deceased, late husband of the said "Mellissa A. Barbour, and has remaining in his hands as such ad-"ministrator, a large amount of money, to-wit: $22,722.20 (twenty-"two thousand seven hundred and twenty-two and 20-100 dollars), "which is due to the said Mellissa A. Barbour, as widow of said de-"ceased, and as guardian of Maggie Barbour and May Barbour, two "minor children of said deceased. Now, if said Hubbard Colby "shall well and truly pay to said Mellissa A. Barbour the amount of "said money in his hands, as he is required by law to do, then these "presents shall be void, otherwise to be and remain in full force and "virtue in law." (Rec. p. 3.).

(See answer Mrs. Barbour, p. 8 and answer of the guardian, p. p. 10, 11).

The recitals in the conditions, and the admissions referred to in the answers, are important, as will be noted further on.

Both mortgages were left with the County Recorder at the same time, October 1, 1873, and were duly recorded.

The allegations of the bill incumbent upon complainant to establish, are

First. That at the time Mrs. Barbour received the mortgages from the bankrupt, he was insolvent, or contemplating insolvency or bankruptcy.

Second. That the mortgages were made to her with the intent by Colby to give a preference to her as one of his creditors.

Third. That Mrs. Barbour then knew, or had reasonable cause to believe Colby was insolvent, or contemplating insolvency or bankruptcy, and that the mortgages were made in fraud of the provisions of the bankrupt Act.

The answer of Mrs. Barbour found p. p. 7, 8, Rec. does not deny, but admits, the allegations of the bill above, numbered first and second. It denies those numbered third.

The guardian's answer (p. 10), denies all the above allegations.

ARGUMENT.

I.

Upon the matter of Colby's insolvency, October 1st, 1873, we may be brief.

Though prior to the financial reverses in the summer of 1873, he may have appeared to the world as solvent, his were like the appearances of others who proved to have been mere "shells" for a long time before, only awaiting a test to develope their true condition.

Nearly all of his show of property was made upon borrowed money. While he was the nominal owner of large amounts of stock, mostly watered and nearly worthless, he is compelled to admit (Rec. p. p. 101, 104, 109,) in his testimony given for defendants, that before the panic, every dollar of those stocks, except possibly $500 of his Farmers National Bank Stock, was pledged to secure his own individual debts for borrowed money; besides which he was owing to parties who held no such collaterals, an amount safely stated at $110,000, all of which he claims to have used in various enterprises in which he was interested.

It is shown from the testimony that he never had the opportunities of legitimately acquiring any large wealth.

Commencing with his humble, but respectable position as school-teacher, at $20 per month, with less than $100 of property, at the small village of Lexington, he came to Mansfield, owning no real estate; read law a while, and taught school a portion of the time. (Rec. p. p. 90, 91, 92.)

He mentions a brief merchantile experience with his father-in-law, Geo. Armentrout, which must have been on a very limited scale. He pretends to be unable to give any idea of the amount of capital he had or invested at that time. (p. 91). He entered the Farmer's Branch Bank, Mansfield, in 1851, then owning his homestead, which

cost him $1500 or less, and, he *thinks*, a piece of land known as Colby's addition to the town of Mansfield, for which he thinks he took up some of Geo. Armentrout's paper. (p. 92).

His salary at first was $800; of which he could save nothing, having a wife and two children, and keeping a man and woman servants. The salary was increased to $1,000, then to $1,200, $1,500 and $1,800, during which time he made improvements upon his homestead costing, he thinks, $10,000. (Rec. p. 93). He made charitable donations of $1,000 a year to churches, &c., and became a fashionable liver.

After he ceased to be cashier of the Farmers Bank, his attention was given to the business of the Mansfield Machine Works. He borrowed money, with which he purchased stocks and real estate; and kept up a credit by borrowing from one to pay another, until he owed upward of $175,000 for borrowed money in September, 1873, exclusive of debts contracted by him and three others for the Mansfield, Coldwater and Lake Michigan Railroad, $50,406; and his liability for W. S. Hickox, $58,000; making over $283,000; $50,000 of which he borrowed in the nine proceeding months of 1873. (Rec. p. 113), to pay off matured debts. $40,000 or more of *his* liabilities were due before October 1st, 1873. (p. 107).

What available assets had he with which to pay this immense debt in the summer of 1873, down to October 1st?

He itemizes his assets (p. 102), as follows:

REAL ESTATE.

Homestead, 3½ acres; undivided half Geddes Block; Bell farm, 130 acres; undivided third Chicago lots; lot in St. Louis, Mo.; undivided fourth Crestline lots; lots 35 and 37, Sherman's Addition, Mansfield; two lots Colby's Addition, Mansfield; bakery property corner Main and Bloom streets, Mansfield; one-third interest Kelley's Island House.

PERSONAL PROPERTY.

Stock—Mansfield Machine Works, nominal,	-	$70,000
" Farmers National Bank,	- - -	10,500
" Mansfield Gas Company,	- - - -	20,500
" Paper Mill Company,	- - - -	5,000
" Sandusky, Mansfield & Newark R. R.,	-	300

He mentions Port Washington Coal and Mining Company and Coldwater R. R. stocks which he admits were not only worthless,

but a liability attached on account of his ownership, for debts of the Companies. Other personal property he estimates at $20,000.

He repeatedly says he does not know what the cash market values of his assets were, but he undertakes to give estimates, which, as to both stocks and realty, will appear from his own statements to be fictitious, and exaggerated to make a paper showing. If the Court is disposed to follow us through an examination of the testimony, by which alone we are guided, it will have no difficulty in agreeing that the statements of Colby are wholly unreliable on this subject, except in saying (Rec. p. 102), that he does not know what any of the items would have sold for in the market, October 1, 1873.

H. P. Davis, one of H. Colby's sureties on his administration bond, interested in making a good showing, says, (p. 130), in his judgment, the homestead was worth from $18,000. to $20,000.

S. B. Sturges, raised in Mansfield, who owns, and dealt largely in real estate, values it at $20,000. (p. 146). Colby puts it at $30,000 in his showing. But, when he testified on the same subject, while endeavoring to show that it would not pay the Beverstock mortgages on it, put it at $15,000. No other testimony was given. So, a liberal estimate would be $20,000.

BELL FARM.

James Dickson, an extensive land owner, and President of Mansfield Banking Company, has known the farm 23 years; says, $90 to $110 per acre, September and October, 1873, without any depreciation in 1873. (p. 132).

Colby paid only $12,000 for it in 1867, when real estate was active; less than $100 per acre.

John B. Daily, real estate agent, acquainted with it 25 years, values it at $150 per acre. Says, not much demand for real estate so far out of town. (p. 136).

Peter Ludwig, owning and living on adjoining farm since 1862, says, not over $100 per acre in September and October, 1873. (p. 137).

E. W. Smith, real estate owner and broker, says, without depreciation by the panic, not over $150 per acre. (p. 138).

James Purdy, who has known the farm fifty years, a large real estate owner in the city, not over $75 per acre. (p. 139).

S. B. Sturges, well acquainted with the land and prices, says not over $120 to $150 without panic depreciation in September and October, 1873; but there was no demand for lands in the vicinity, in those months. (p. 146).

Hubbard Colby says he paid on it $8,000 and assumed James Dickson's mortgage of $4,000 then on it; that the income from it for five years before his bankruptcy was trifling. The improvements were poor. He expended not over $1,000 on it after his purchase. His estimate could only be upon the expectation of selling it out in *town lots*, which, from all the testimony, is shown to have been the merest speculation. (p. 105).

Defendants were content to rest on this showing. A fair average of the above would be a fraction over $116 per acre, or $15,080 for the whole; while Colby lists it at $50,000. His exaggerations are similar as to other property.

THE GEDDES BLOCK.

In this, Colby owned an undivided half. James Dickson who owns business rooms fronting on the same street, testifies, (p. 132) that this block was worth from $25,000 to $30,000.

John B. Daily, the real estate agent, valued it at $30,000 to $35,000. (p. 136).

E. W. Smith, real estate agent, gives $30,000 without panic depreciation. (p. 138).

James Purdy, not exceeding $25,000, possibly $30,000. (p. 139).

S. B. Sturges, $25,000 to $30,000 without depreciation by the panic. (p. 146,)

Wm. B. Mercer, defendant's witness, who occupied one of the rooms, $25,000 to $30,000. (p. 123).

We allow the liberal figures of $30,000 for the whole, or $15,000 for Colby's half, which he lists at $25,000.

ONE-THIRD OF CHICAGO LOTS.

This property, Colby testifies, (p. 105) cost him $6,000, or $18,000 for the whole at time sale. That from $9,000 to $12,000 was afterwards expended in improvements, making a total $27,000 to $30,000.

Mr. Purdy testifies, (p. 139, in answer to ques. 7) that was the cost. He owned a one-third interest. In the fall of 1873 its value was very low. The income did not keep it in repair. In 1873 could hardly have sold it for more than cost, or $30,000. But, say $33,000, which would give Colby $11,000.

The Crestline property we will estimate at Colby's own figures, $500.

The lots in Sherman's addition at his valuation,	$1,000.
The lots in Colby's addition, at his valuation,	3,500.
The St. Louis property at same, - -	3,000.
His interest in Kelley's Island House at his estimate, - - - - - - -	700.

Colby includes a lot on the corner of Main and Bloom streets, Mansfield, at $5,000, but says: (p. 106). He only paid $1,000 on it a short time before, and the balance of purchase money was unpaid at his bankruptcy. He gave all his interest to his son Henry long before the 1st of October, 1873. It was sold on foreclosure of vendor's claim, and realized nothing to his estate.

AS TO HIS STOCKS.

Greater exaggeration is prominent in his statement of values. He could give no market values. While he quotes them at "par," he knew, as every man of his intelligence did, that all such investments were greatly depreciated by the panic long before October 1, 1873.

The history of his acquisition of the Mansfield Machine Works Stock, which he puts at $70,000, not only developes the fictitious character of his estimates, but his knowledge of its real value. We may be pardoned for hurriedly reviewing it.

He contributed one-fifth of the original capital of $50,000, for a small foundry. (p. 99). In about two years, without new contributions of capital, and after declaring forty per cent. in dividends in cash, amounting to $20,000 on the original stock, the Company's nominal capital was increased to $100,000, and divided among the holders of the original. He then held nominal stock, $20,000. Under Colby's directions, the company declared dividends in 1868 and 1869, of twenty-five per cent.

In 1869 he bought $10,000 of the watered stock from E. H. Reese, at $10,000. In 1871 they watered it again, out of fictitous profits, without paying in anything, and the stockholders issued to themselves another $100,000 nominal stock. This gave Colby $60,-

000 of stock, at a cost of $20,000; $5,000 of cash dividends being declared to him in the meantime. In 1871 he contracted for $5,000 watered stock, at par, and gave his notes, which he never paid. In 1872 he purchased from E. H. Reese, $5,000 same stock, at what? Only twenty percent. of its par value—$1,000! That year they declared a dividend of ten per cent. (p. 99).

E. H. Reese had been superintendent of the works for some years and had full opportunity of knowing what the market value of the stock was, as well as its intrinsic worth. He was content to take one-fifth of its face. (p. 99).

Out of an actual investment of $21,000, Colby received in cash $21,000 dividends, and was the owner of $70,000 nominal stock.

That such nominal values were not real, must be apparent; but another page of history demonstrated it. The company took the works of Blymyer, Day & Co., and therefore issued $100,000 additional watered stock. This proved a dead investment and an expense, but increased its capital to $300,000. It declared one dividend after that in 1872 of 10 per cent. (testimony A. L. Grimes, p. 143). Mr. Grimes says "the dividends should not have been declared as the result showed." (p. 145). Their additional shops had shut down, leaving dead material on hand, and the company disabled. (*ibid.*)

Nelson Abbott, Secretary of the Company, familiar with its affairs, testifies: (p. 134) they contemplated making an assignment October 1, 1873.

"*It was talked over right after the failure of First National Bank.*" September 26th, 1873. (p 134, q. 4).

It appears from the secretary's testimony, (pp. 134, 136) that the company was unable to meet its liabilities as they matured, and was insolvent on the 1st of October. He says, Colby, as financial manager of the business negotiated the loans; had access to the books; was in and around the works *up to the failure of Hickox. He never visited the works after that. Why?*

In October, a detailed statement of the Company's condition was submitted and an assignment was again discussed. It followed on November 4, 1873. (Abbott, p. 135).

The Company's statememt to its creditors, including the Blymyer, Day & Co. works, at $103,000, which were closed, and including

patterns, credits, &c., at its own valuation, showed assets, $351,000
Liabilities, - - - - - - - - 171,000

Balance, - - - $180,000

This reduced to money would not pay thirty cents on its capital. So much for its actual worth. So far as sales had been made in the two years proceeding October, 1873, its market price was 20 cents on the dollar. Reese sold for that long before he ceased to be superintendent. He afterwards traded $2,500 stock to Mr. Grimes for 120 acres western lands, such as Mr. Grimes sold for $4 per acre, making about nineteen cents per dollar of stock. (p. 144). While Mr. Grimes once thought the stock worth seventy-five cents, he had no idea the company was so largely in debt, as he did not participate in the active business, as Colby did. (p. 144).

While Mr. Colby, as financial manager of the company, knew the real condition of affairs, he lis s this watered stock, worth only 20 per cent., at par. (p. 102).

Mr. S. B. Sturges, a banker, whose bank held some of the stock on a debt, and who was assignee of the company in insolvency, says it was not worth thirty per cent. in September, 1873. His bank charged its portion up to profit and loss. (p. 147).

FARMERS BANK STOCK.

Mr. Colby puts down $10,500 of this at "par." This bank was brought to the very edge of ruin by the management of Colby and his successor, his son-in-law. It barely escaped the fate of the First National Bank of Mansfield, which was closed September 26th, 1873. The true condition of both banks had been concealed until that date, when it was discovered that the Farmers National Bank could only be saved from receivership by the Directors individually raising funds on their own credit, and the stockholders paying in thirty per cent. of their stock. Out of $129,532 bills receivable, only $45,000 were considered collectable. Mr. Colby was obliged to resign his cashiership in March, 1871, for irregularities. J. Hade, his son-in law, who succeeded him, followed in September, 1873. They left behind them $23,000 of Colby's paper and a liability of the bank for them of $10,000 more upon paper, endorsed by Hade, as Cashier, for Colby, without authority. (Mr. Purdy, pp. 48, 140, 142).

Mr. Purdy, the President of the Bank, swears the stock was not worth fifty cents on the dollar October 1st, 1873. His estimate is fully justified by the detailed statement given. (p. 140, *et seq*).

The $10,000 of that stock pledged by Colby as collateral to $10,000 draft mentioned by Mr. Purdy, (p. 142) was sold at public auction, with competition, at forty cents on the dollar. But, call it worth fifty cents.

Defendants called no witnesses to show the stock worth more.

His Gas stock he lists at $20,500, or par. He bought it from different parties in lots at 60 to 62 cents, none of it costing him over 80 cents, except his original subscription. (p. 101). The works had been left entirely to the management of Mr. Colby. The same policy of declaring dividends, without reference to profits or losses, was adopted while repairs were needed. When Colby left with $2,200 of the company's money, the works were found run down, needing an immediate large investment of capital to rebuild. Mr. Purdy, a stockholder, testifies the stock was not worth over 40 cents October 1, 1873, as the works were worn out. (pp. 140, 141). He says sales at 60 to 75 cents were made before the condition of the works was known.

A fair valuation then is 60 to 70 cents. Defendants gave no proof to the contrary.

The Paper Mill stock seems to have had no market value, of this he had $5,000

His railroad stocks are conceeded to be worthless. He says he had other chattels—$20,000. What were they? He cannot itemize. The assignee has been unable to learn what they consisted of beyond his exempted household goods. The exaggeration shown in other estimates of his property by him, justify us in saying this is mere imagination. Three thousand dollars would far exceed the value of anything he has named under this head. Grouping the items given above we have:

REALTY.		PERSONALTY.	
His farm,	$15,080	M. M. Works stock,	$17,500
½ Geddes block,	15,000	Farmers Bank,	5,250
⅓ Chicago property,	11,000	Gas stock,	13,325
Crestline "	500	Paper Mill,	5,000
Lots, Sherman addition,	1,000	Other items,	3,000
Homestead,	20,000		
Lots, Colby addition,	3,500		
St. Louis property,	3,000		
Interest Kelley's Island,	700		
Bloom street lot,	1,000		
Totals,	$70,780		$44,075

The aggregate of this liberal valuation, $114,855, should be reduced by the value of his wife's dower rights, and the inevitable cost and shrinkage in reducing such property to money. This would leave him about $100,900 of assets to meet a total indebtedness of over $280,000, $175,000 of which was for money he borrowed and used himself.

II.

THE BANKRUPT'S INTENT TO PREFER MRS. BARBOUR.

Hubbard Colby was in this condition of hopeless insolvency, on the 26th day of September, 1873, when the panic of that year burst with terrific fury upon Mansfield. The First National Bank closed its doors never to resume. Williard S. Hickox, the most intimate friend of Mr. Colby, was found to have robbed that bank of its assets and left it empty. Mr. Colby was on $58,000 of Hickox's paper. But, without this liability, or that of $40,000 incurred for the Coldwater Railroad, his condition must have immediately become apparent. He had borrowed over $50,000 in the few months preceeding. Over $40,000 of his own debts had matured, and were unpaid. He had been paying eight and ten per cent. on most of his debts. (p. 110, 116). His stocks, all but $500, were held by his creditors. He had no resources with which to meet his matured and rapidly maturing debts. He testifies that banks would lend nothing. (p. 110). He says he knew some claims were due, and others would mature in a few days, which were likely to be demanded. On the very day of that bank failure he borrowed $10,000 of 5-20 bonds of Allen Beverstock to meet a pressing demand of the Farmers National Bank, and executed a mortgage on his homestead to secure the loan. (p. 111). The Bell farm was then encumbered by a mortgage of $4,000 to Dickson. (p. 17) and $7,500 to the Dennison University.

His interest in the "Geddes block," by a mortgage to Mrs. Kimball, $7,000.

He knew that the load of Hickox's paper he was on was then his debt in every sense. He was not blind to the inevitable results of Hickox's failure. He knew that he had signed paper in blank and delivered it to Hickox to be filled with such amounts as Hickox pleased to insert. The street corners were filled with knots of men discussing the ruin that involved—the closed bank, Hickox, and Colby, as well. As is shown by the testimony hereafter quoted, he could not go out of doors without coming in contact with the excitement, consequent upon those financial disasters, including his own. The

banks were paying only $50 to their depositors. Every avenue for his relief was closed. Did he not *then* and immediately reason upon and contemplate the effect of developments working publicity of his own ruin, and upon whom the consequences would fall? As is natural for a man in that situation, he thought to save those nearest to him. He had been brother-in-law and friend of Justus S. Barbour, who, at his death, in November, 1865, had left an estate of upward of $40,000. He had been entrusted with the administration of this estate because of that relationship. (p. 107). He had paid the debts of the estate within a few months after his appointment, but instead of then making a final settlement in discharge of his trust, he appropriated the money to his own use, and for years suffered no disturbance of mind as to his legal duty. He had not filed even a settlement account showing the amount due the widow and heirs. He was not called upon or pressed by any person to perform his legal duties. He cannot say who suggested the execution of these mortgages. Yet, within five days from these overwhelming disclosures, and in the midst of what was staring him in the face as the blackest ruin, he drew up these mortgages to Mrs. Barbour, on his already incumbered lands, covering substantially all of them, called in a notary intimate with the family, who took the acknowledgements, and by the notary sent the instruments at once to the Recorder's office, for what? to secure Mrs. Barbour against loss of those funds which he had appropriated and used for years, while he was under the same legal obligation to pay over the balance, which obligations had not increased a jot for those years. He pursued a method of securing those funds entirely irregular, and not contemplated by any law govering his trust. He was quickened to this irregularity by no legal duty; indeed, by nothing but his desire to save his bondsmen and Mrs. Barbour out of the wreck already crashing over him. The appropriation of substantially all his real estate, viz: the Bell farm, the Geddes block, and his interest in the Chicago property, (his homestead, then being mortgaged to Beverstock for $12,000) to secure Mrs. Barbour, left nothing for the army of creditors that he knew would be pursuing him at once.

Under these circumstances can there be any doubt of his *actual* intention to prefer Mrs. Barbour and his bondsmen?

The familiar interpretation of the *intent to prefer*, is recognized in several cases in this and other Courts.

It is an intent to give one creditor an advantage over others in respect of payment or security of his debt.

Bump 10 *Ed. p.* 817, and cases cited.

Forbes vs. Howe, 102 Mass, 427.

"The transfer by a debtor of a large portion of his property while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such a case, and not upon the assignee or contestant in bankruptcy."

Toof vs. Martin, 13 Wall. 40.

Wager vs. Hall, 16 id, 584.

"It is a general principle that every one must be presumed to intend the necessary consequences of his acts."

Field J. *Toof vs. Martin.*

(See cases cited by Bump on B'k'cy., 10 Ed. p. 817, *et seq*).

Mr. Colby is surely chargeable with knowledge of the extent to which his real estate and stocks were unavailable to meet his indebtedness, as well as the effect of his encumbering his realty with the Barbour mortgages beyond the fair value of the property, and of the helpless condition he was placed, and placing himself in. He knew that substantially nothing would be left to aid in extricating himself from the deeper difficulty these acts of preference would place himself in toward his other creditors. He was already put to the greatest extremity in borrowing the last $10.000 of bonds of Beverstock, on the day of the First National Bank failure, for the value of which, $12,000, he mortgaged his homestead. He knew of the Dickson mortgage, $4,000, and the Dennison University mortgage of $7,500 on the Bell farm, and of the $7,000 mortgage on the Geddes block. He knew, with every other business man in Mansfield, on the 26th day of September, 1873, that every dollar of the paper he was surety on for Hickox, was his debt, and would be enforced against him to the extent of his responsibility. He knew that he, with Hickox and two other Directors of the M. C. & L. M. R. R. Company, as principals, were makers of $50,000 of notes held by various banks which could not be renewed, or any part of them paid by Hickox.

(See testimoy of H. H. Sturges, p. 6).

The public discussion everywhere in Mansfield, *at the time, and immediately* after the closing of the First National Bank, pointed to Hubbard Colby, more especially than any other person, as the man most effected by Hickox's failure. And it was then known that he was on about $60,000 of Hickox's paper. (W. S. Bradford, County Clerk. Rec. p. 73).

With these surrondings, can any person be heard to say, that his affairs were such, that he could reasonably expect to pay all of his debts?

III.

Did Mrs. Barbour have reasonable cause to believe that Hubbard Colby was insolvent, and that the mortgages were in fraud of the Bankrupt Act?

The language of Sec. 35, of the Bankrupt Act, 1867, as in force prior to the amendment of 1874 on this point, is: "The person receiving such assignment, transfer or conveyance, having reasonable cause to believe such person is insolvent, and that such assignment, conveyance, &c., is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover," &c.

In inquiries on this subject, it is well settled that the peculiarities of the person recieving the preference, or his neglect and want of caution, circumspection or attention to business, will not avail him anything upon a claim of ignorance.

The law conclusively presumes him or her to be a person of *ordinary prudence, sagacity and discretion.*

The practical administration of this law must of necessity call for a uniform operation upon all persons. It would not do to hold a given state of facts or surroundings, reasonable cause to believe as to one person, because he was sagacious, vigilant, and active in pursuit of his interests, and not such cause to another, because he was confiding in disposition—trusting everybody, or negligently blind to that which was plainly to be seen or heard by the most ordinary exercise of common faculties. Any other rule would involve an investigation into the temper, habits, disposition and care of each person receiving preferences.

The law furnishes a standard applicable to all persons alike, easily understood, and readily applied—the cause of belief of a reasonable man taking a transfer of property under like circumstances.

Scammon vs. Cole, 3 Bankrupt Reg. 393 (1st Ed. 3 B. Reg. 100).

Toof vs. Martin, 13 Wall., 48.

"Actual knowledge of the alleged fact is not made the criterion of proof in such an issue; nor is it necessary to appear that respondents actully believed that the mortgagor was insolvent; but the inquiring is whether they, as business men, acting with ordinary *prudence*, *sagacity* and *discretion*, had reasonable cause to believe the debtor was insolvent in view of all the facts and circumstances known to them at the time the conveyance was made. * * If it appears the debtor was in fact insolvent as alleged; and that the means of knowledge were at hand, and that such facts and circumstances were known to the grantee, as were clearly sufficient to put a person of ordinary prudence and discretion upon inquiring, it is well settled that it would be his duty to make all reasonable inquires to ascertain the true state of the case. Purchasers are required to exercise ordinary prudence in respect to the title of the seller, and if they fail to investigate when put upon inquiry, they are chargeable with all the knowledge which it is reasonable to suppose they would have acquired if they had performed their duty in that regard."

Wager, vs. Hall. 16 Wall. 601, citing:

Colburn vs. Proctor, 15 Gray, 38.

Tiffany vs. Lucas, 15 Wall., 410.

Scammon vs. Cole, 5 Nat. Bankruptcy Reg., 263.

Buchannan vs. Smith, 16 Wall., 308. See.

Merchants Nat. Bk. vs. Cook, 5 Otto, 346.

In *Scammon vs. Cole*, 5 B. Reg., 257, cited in the opinion by Mr. Justice Clifford, *supra*, it is said:

"Constructive notice is sufficient upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of third persons are about to be effected, an inquiry as to those facts is a moral duty, and dilligence an act of justice. Whatever puts a party upon inquiry is sufficient notice where the means of knowledge are at hand, and if the party under such circumstances omits to inquire, and proceeds to receive the transfer or conveyance, he does so at his peril, as he is chargeable with a knowledge of all the facts which by a proper inquiry he might have ascertained."

The same doctrine is stated and enforced by this Court in *Buchannan vs. Smith*, 16 Wall., 308, where the above is cited and approved.

"Evidence of the creditor's actual belief is inadmissible, if he had reasonable cause to believe, as it is immaterial whether he did in fact believe or not."

Forbes vs. Howe, Colburn vs. Proctor, supra.

Bingham vs. Richmond, 6 B'k'cy, Reg. 127

If actual knowledge of insolvency is not required, then actual knowledge of one debt, other than the one preferred, is not essential, as one other debt may make the debtor insolvent.

The well settled rules of equity, as expounded by the most eminent judges and Courts, would well justify a finding in this case, that the mortgagee had notice or knowledge of all the essential facts, especially the insolvency of Colby by the 1st day of October, 1873.

We find where "notice" was required to effect a purchaser, it has been held that he would be presumed to be a person of ordinary caution, prudence and attention to matters of buiness in which the rights of others were likely to be effected.

Lord Hardewicke, in applying the former rule in *Smith vs. Lowe*, 1, Atkyns. Rep. 489, says:

"Whatever is sufficient to put a party on inquiring is good notice in equity to that party."

Sir Wm. Grant, M. R., in *Hill vs. Simpson*, 7 Vesy. 170, says of purchasers:

"If they neglect that, (common prudence), and take the chances of his speaking the truth, thay must incur the hazzard of his falsehood. The rights of third persons must not be effected by their negligence. I do not impute to them direct fraud, they acted rashly, incautiously, and without common attention used in ordinary business.

It was not necessary to use any exertion to obtain informtion, but merely not to shut their eyes against the information, which, without extraordinary neglect, they could not avoid receiving.

One have constructive notice in equity of such facts as he might have ascertained but for his own want of care and prudence.

Oglive vs. Jeafreson, 6 Jurst N. S. 970.

The same doctrine was recognized and enforced by this Court in in admiralty. *The Lulu*, 10 Wall. 202; citing: *May vs. Chapman*, 18, Meeson & W. 350; and

Goodman vs. Simmons, 20, Howard, 343.

We do not understand the doctrine thus applied, and upon which cases in this Court arising under the Bankrupt Act have been decided, to be in conflict with the case of *Grant vs. National Bank*, 97 U. S. (VII. Otto) 80.

It surely was not the intention of the Court in that case to exclude the rule so long applied to a great variety of cases involving the duties of purchasers of property, when others were to be seriously effected by a plea of ignorance, when the smallest amount of care or dilligence, or the least exercise of ones faculties must have fully advised them of the effect of the transaction upon others; when a person of ordinary prudence and dilligence could not fail to be notified of the surroundings.

The doctrine of notice inferred from the surroundings of the party sought to be charged, when they are of such a character that a person of ordinary prudence and vigilance would have inquired into the facts readily aceessible, is quite consistent with the policy of the Bankrupt Act. Indeed, Sec. 5130 Rev. Stats. embodies a branch of the long recognized rule in equity. It devolves upon the creditor a legal duty of inquiry into the financial condition and standing of the debtor when unusal or extraordinary appearancs attend the giving of security for a pre-existing debt, or the sale of property. Any other rule, we conceive, would "give easy triumph to fraud." See cases cited in notes, *White and Tudor*, L. C. Eq., 4th Ed., p. 154. We will consider the more direct application of Sec. 5130, Rev. Stats. to other features of this case further on.

It appears from the testimony that it would have been impossible for a person of ordinary prudence and care, with Mrs. Barbour's surroundings, to have avoided *knowledge* of Colby's condition of insolvency without an effort and purpose to do so.

We will review first, some of the testimony showing the most abundant sources of information that completely surrounded and forced themselves upon her. These are important as bearing upon two aspects of the case. They were every where at hand.

From the hour the First National Bank was closed, and Hickox went down with that institution, Colby's insolvency and ruin was the all absorbing topic of conversation *among all classes, everywhere*, in and about the community where Mrs. Barbour mingled as usual with her

friends and acquaintances, and, as she admits, she came in contact with the excitement that pervaded all social and business circles.

On that day, and during the week following, she was around as usual, sociably talking with her neighbors and friends. Her dwelling house was but three or four doors from the Farmers National Bank, on the main business street, and in the heart of the city, She was on the streets while the excitement and talk upon the subject was great, and there heard of the failure of the bank and Hickox. (pp. 84, 85). She says everybody was talking about it. (id. q. 74, 75, 76, 77).

That she did hear reports upon the streets that Mr. Colby was involved in the troubles, which led her to employ legal assistance, she admits, but she fixes the time, as she thinks, in November. It is clear from the whole of the testimony she is mistaken as to the time. Mr. Dunn was her brother-in-law, whom she says she employed as her attorney at that time. Mr. Dunn was the party who first informed her of the fact that a mortgage had been executed by Mr. Colby to her without her request. (Rec. pp. 82, 84). He lived at Mt. Gilead, Morrow county, Ohio. Mrs. Barbour is singularly wanting in recollection as to how Mr. Dunn happened to come over to Mansfield while this excitement and talk was so universal, and how he happened to interview Mr. Colby just before these mortgages were executed; (p. 107), and as to what knowledge Mr. Dunn imparted to her, farther than that the mortgages had been executed. As to the time Mr. Dunn so informed her she cannot say, but some time *about* the 1st of October. Several others were so interested in her behalf as to go over to the Recorder's office and examine the mortgages and report to her the contents. (p. 83). If the singular obliviousness to some things patent, and want of thought on her part, relative to this important business, at this important crisis, does not thus appear because of unreliability of her recollection, but is a true statement of the business, we are led to but one inference—that there was a careful avoidance of information, and a wilfull closing of eyes and ears to shut out that which crowded with painful pregnancy upon every person else surrounding her. It matters little which view is taken. We would rather attribute it to her imperfect memory of things against her interests to remember.

True, some of the peculiar features of the transaction are attempted to be explained away, but they will not bear strong or even feeble light, as even plausable pretexts, as we shall see presently.

How was Mr. Colby viewed by the community with which Mrs.

Barbour says she mingled as usual, and even met and conversed with on the streets and elsewhere, while, as she says, the excitement and talk was universal?

"The fact that a debtor was reputed insolvent at the time of an alleged fraudulent preference of a creditor, is competent evidence tending to show that his preferred creditor had reasonable cause to believe him insolvent."

Lee vs. *Kilburn*. 3 Gray. 594.

Such testimony is clearly admissible on the ground that

"The belief of men as to matters of which they have not personal knowledge is reasonably supposed to be effected by the opinions of others who are about them."

Carpenter vs. *Leonard*, 3 Allen, 32.

Whitcher vs. *Shattuck*, 3 id., 319;

1 Greenleaf on Ev. (Redfield's), 116 and note 3;

1 Wharton Evidence sec's. 252, 253, 254, and cases cited;

Angel vs. *Rosenberry*, 12 Mich., 241.

Capt. A. C. Cummins, whose family was very intimate with Mrs. Barbour, and whose wife is a niece of hers, testifies, (p. 20).

"Our families (Mrs. Barbour's and witness') are intimately acquainted, and associate together, and made frequent calls on each other. * * I think after it became generally known after the failure of the First National Bank and of Mr. Hickox, that he endorsed largely for Hickox and for the M. C. & L. M. R. R., and the amount of his indebtedness to the Farmers National Bank, he was generally considered insolvent, so for as my knowelcge goes. (p. 21.)

There was considerable talk and excitement for days after the failure. And Mr. Colby's name was mentioned in connection with it, when it became generally reported that he was on a large amount of Mr. Hickox's paper. It was, perhaps, generally known that they were borrowers.

Mrs. Barbour resided within 240 feet from the Farmers National Bank on the same street (Main street), and Colby passed her residence in going to and from the bank to his house, and in going to any general business part of the city. Mrs. Barbour had a brother in that bank for a number of years, and Hade, her nephew by marriage, who was there for three years." (p. 22).

Mrs. Cummins testifies to the same intimacy. (p. 29.)

Eckles McCoy (pp. 30, 31): "Known Colby 25 or 30 years. I remember the occasion of the failure of the First National Bank, fall 1873. I was Superintendent of City Water Works. It was about the time, or *immediately* after the failure of the bank, that there was a general report in circulation that it would carry down with it Mr. Colby and others. The reason why, as I understood it, was, that Mr. Colby was a heavy endorser for Mr. Hickox, for the railroad and in other matters. That was about what I heard, and what was talked over by men *as they met in crowds during those exciting times*. Said reports as to the effect of the failures of Hickox, and the bank, were a subject of general conversation and discussion immediately after the failures. (p. 30).

On cross-examination: "Prior to the failure of that bank I heard it a number of times that he was Hickox's general endorser. It was alluded to in almost every conversation on that subject after the failure of the bank; and my understanding was that Hickox and the bank would cause the failure of Colby. My impression is, I learned he was on railroad paper to the extent of $30,000 or $40,000. The failure of the bank brought it into general conversation.

The subject of Mr. Colby's failure was generally talked of as a result of the failure of the bank and Hickox, from the time the general reports of said failure were put in general circulation."

We invite the attention of the Court to the positive nature of complainant's testimony as to the time these general reports commenced; as it is claimed by the defendents that they did not become current for a week after of the failure of the bank.

Byram B. McVey, a lumber dealer, testifies: (p. 32). "The failure of the bank, Hickox, and McMann, Friday, September 26, 1873, created an excitement, and was the general subject of conversation. He was present at a meeting held on the evening of that day—Hickox, McMann, J. H. Cook, J. H. Reed, H. C. Hedges, were present. McMann then stated that Hickox's failure would result in the failure of Colby.

At another meeting the following Saturday evening, the same persons, Geo. Clugston and M. R. Dickey were present Hickox said, in connection with his failure, it would ruin Colby. He said, "poor Colby! it would ruin Colby; it is too bad!" with a great deal of emotion.

On Monday, September 29th, another meeting was held at the bank. The same parties, John Sherman, and John Runyan, the teller, were present. We had the bills receivable of the bank before us at the meeting, and a private memorandum book kept by McMann of the rediscounted bills. *Colby was indorser or principal on bills rediscounted for not less than* $40,000. It was a subject of conversation that the failure of the bank and Hickox would result in the ruin of Mr. Colby: Mr. Hedges there said, "*It will ruin Colby.*" He says:

"I remember that the remark was made that, financially, Mr. Colby was about as Mr. Hickox. The words were '*that financially he was a shell*'.

There were a number of meetings of the persons I have named. On Monday, or as early as Tuesday, Hade was called in and assisted in examining papers. Hade, in going to and from home, would pass Mrs. Barbour's house.

He examined the books and list of rediscounted paper.

I don't remember whether Colby was in the city on the day of the failure or not; but I do remember that he was in the city in the evening. I saw him on the Sunday evening following. I knew of his making some inquiries about the banks. They were made to myself on the Sunday evening following the failure of the bank, on the porch of H. C. Hedges' residence.

On the Sunday afternoon following the failures, Henry Rowland and John Shellenbarger (the County Treasurer and his deputy) were at my house. Rowland said he understood Colby was largely involved with Hickox, and wanted to know if it was correct. I gave Mr. Rowland, confidentially, the information I had received from the bank as to Colby's appearing or the paper found, as I have before stated. It was in the afternoon of the same day of the conversation with Colby."

This testimony explains how it became known from official sources that Colby was on so large an amount of Hickox's paper, before the formal subsequent investigation into the bank affairs took place. It is shown that the public had it accurately enough to know that Colby had gone down with the others, even before these sources of more exact information were opened.

William Bushnell, a surgeon, of fifty years residence in Mansfield; well acquainted with all the parties, testified: (p. 35).

"I remember the occasion of the failure of the First National Bank and Hickox. There were reports in circulation in Mansfield, *commenced at the time of the failure*, as to its effect on Colby, and continued from day to day. It became a very general subject of conversation between squads of men. The character of the talk was, it would be disasterous to Mr. Colby and the Farmer's Bank, of which Colby was an officer. * * Colby was spoken of a good deal. There was a meeting of the citizens of Mansfield shortly after the failure of the First National Bank. I was present. It was the same day or the next day. My impression is it was the next day. It was held at Miller's Hall. It was quite a large meeting. The subject matter under consideration was, to pass resolutions requesting the depositors in banks not to make a rush upon the banks to draw out their money.

There was great excitement, &c. On that day the financial condition of Hubbard Colby, and the effect of the failures of the bank and Hickox would have upon him, was pretty generally talked over, and

also before that meeting was called. It was the *general* subject of conversation among citizens on that day, that it would effect Mr. Colby.

The extent of his liabilities, as surety for Hickox, and the railroad, and his personal liabilities, was spoken of very frequently after that day, (Saturday), and I think on that day; but I did not hear of it prior to that day. Can't say what amount; don't think the sum was mentioned, but it was spoken of that he was largely involved with Hickox. As to its being general, it was spoken of *very often. It was general.* Attended private meeting Friday evening before, at house of Jolly, Cashier of the Richland National Bank, dozen men present, and discussed the propriety of calling a public meeting, and generally, the effect the failure of that bank would have upon the people."

And, on cross-examination: "The conversations, as to the effect of the bank failure, &c., on Colby, *was on the same day of the failure. It was very soon after the doors were closed, I think.*

It was a subject of general conversation.

It was talked frequently in those days that Colby was a large borrower of money, and he would be broken up if a run was made on the bank."

Rev. C. S. Doolittle, testifies: (p. 38).

"The reports I heard were, that Colby had signed largly for, and was heavily involved with Mr. Hickox and the Farmer's National Bank. It was pretty generally talked of; I talked with a number of citizens myself on that subject; connot tell the day or the exact time, but, it *was quite soon after the failure.* My impression is, that the talk was, that he was so largely involved that it would effect him seriously. The pubic mind on *Saturday, Sunday and Monday following the failure, was intensly excited and generally alarmed.* It was generally rumored that it must be disastrous to some of our business men." And on cross-examination: (p. 39). "It was talked that he was a large borrower of the First National Bank, and of the Farmers Bank.

It was discussed that he was on Hickox's paper largely, the *forepart of the week following.* There was a public meeting Saturday, and a meeting of parties interested in the bank and Hickox, on the *forepart* of the week following."

Hiram R. Smith, testifies: (p. 40.).

"Sixty years of age. Known Colby since he came to Mansfield; Mrs. Barbour since she was a girl.

The bank failure created a great deal of excitement amongst the people, and a great deal of talk how far it would extend, and a great deal of surmising as to how Mr. Colby was involved with Hickox.

The talk commenced *directly after the failure.* Heard a great deal of talk about it," &c.

Thomas E. Douglass, the Postmaster, testifies: (p. 41.).

"I recollect the circumstances of the failure, 26th of September, 1873.

The next day after the failure I heard it rumored that Colby had bailed Hickox to a large amount, and at different times afterwards, by several parties.

Heard several parties say it would throw him into bankruptcy.

They were rather general. The failure of the bank and Hickox was the general topic of conversation, for days after. It was said to be the reason, that Colby had bailed Hickox to a large amount, and having been doing business with him, and as surety on his notes. Talked with H. P. Davis about his being on Colby's bond, and the effect of Colby's failure on him, &c.; think within a week, and *not so long.* (p. 45).

In the conversation during the week following the failure, *Rowland said: 'Colby told him that he would either have to or did not know but he would have to begin where he had a number of years before;* and either said that he would or might have to rub out his slate and begin anew, and I am not able to give exact language."

Lathrop J. Tracy, testifies: (p. 45.). "49 years of age, am grain and produce dealer. It was generally talked that Colby would be effected by the failure, because it was generally known that he and Hickox were on each others paper; that the one endorsed for the other. It was *generally* talked in connection with the failure of the bank and Hickox; immediately after the failure of the bank and Hickox. It was *generally talked* on the streets, by a great many, and and more especially by business men."

Patrick P. Ford, testifies: (p. 51). "Am a grocer by occupation. Reccollect the failures 26th September, 1873. There were reports in circulation that Mr. Colby had endorsed a great many notes for Hickox, and the consequence would be, *it would break Colby up.* It was a general topic of conversation within *two days* I should think, after the breaking of the bank."

John B. Netscher, testifies: (p. 55). "I was mayor of the city of Mansfield on 26th September, 1873. I was away and returned home that evening. Heard the reports the week following the failures, as to Colby's connection with the bank and Hickox, and that it would take Colby with them,"

James Dickson, testifies: (p. 56).

"*The next morning after the failure* I was on the street and heard that Colby was on paper, and would likely effect him. It appeared to be frequently talked of. I heard it frequently. *The report was, 'he was on paper with Hickox, and it would be the means of Colby's failing.*

Heard the amount stated but don't recollect."

E. W. Smith, testifies: (p. 58).

"Insurance and real estate agent. I remember there was a general conversation in regard to the effect of the failure. It was general and quite soon after the failure, during the excitement, to the effect that Colby and Hickox were connected with each other in business relations, and it would likely effect Colby financially.

Heard something like this, that Colby was on Hickox's paper to the amount of some *sixty thousand dollars*, and Hickox on Colby's forty or fifty thousand. This was circulated *the first of the week after the failure*."

Dr. Wm. Loughridge, physican and surgeon, testifies: (p. 59).

"Heard Hickox had been borrowing money conjointly with Colby shortly after the failure."

Thos. J. Robinson, testifies: (p. 60).

"Real estate and insurance agent. Heard the reports and talked with parties on the Thursday after the failure."

Z. S. Stocking, testifies: (p. 61).

"I reside in Cleveland. Was in Mansfield on the day of the failure of the bank and Hickox, and on the Tuesday following. I remained in Mansfield *three days* of *the week following the failure*. I heard all sorts of rumors about Colby and Hickox; that they had interchanged signatures upon business paper largely, and that the failure of the bank necessitated the failure of both Hickox and Colby. It seemed *quite general* with such business men as I happened to converse with. The panic and the failures were the subject of conversation wherever I went. I left Mansfield to return to Cleveland on Friday of the week after the failures.

The amounts of Colby's indorsments were variously stated in large sums—have forgotten the amounts." And, on cross-examination: "On Sunday next after the failures (28th September) I met Oscar Townsend in Cleveland.

He informed me that he had returned from a visit to Hickox, and he informed me that the failure of Hickox and the First National Bank were bad, *and Colby must inevitably be ruined by it.*

The report of the bank officers constituted no part of my remembrance of the numerous opinions I have referred to. Don't know when that report was made. For some time prior to, and up until the failure of the bank, I think Colby and Hickox were generally known to be intimate, socially and in business relations, for some years previous to the failures.

I remember reports to the effect that all, or a portion of, the Board of Directors and officers of the railroad, were liable from $40,000 to $60,000, for money borrowed for the construction of the road. I got the impression that the executive committee were chiefly liable for the payment of the money."

Henry H. Sturges, testifies: (p. 66).

"I was Assistant Treasurer of Coldwater R. R. Office over the

First National Bank. Hickox was President of the road. There was a general knowledge among the citizens that we were endorsers, but it was not known to what amount. Colby was on about $51,000 of R. R. paper, $10,000 to $20,000 *of it due at the time referred to,* (October 1st., 1873).

There were very general reports in circulation that Colby was a heavy indorser for Hickox, *within from two to four days.* I know the reports were general after the failures." And on cross-examination:

"I don't know that the reports came from the examination of the officers of the bank. But I do know it was a general report on the streets. *If that report of the officers was not made for a week or ten days, still am not mistaken as to the time.*"

Walter S. Bradford testifies: (p. 71).

"Am County Clerk was real estate and insurance agent in September and October, 1873. Resided here 16 years. There were reports in circulation shortly after the failure of the First National Bank as to the condition of Colby in consequence of the failures. The character of them was that the failure of Hickox would very seriously affect Colby, financially, as he was said to be an indorser for Hickox to large amounts. I heard a good deal said about it by many people.

Colby being a prominent man, it was general talk. I should say it was within two or three days, or sooner." And on cross-examination:

"Heard these reports either Saturday, Sunday or Monday. Heard it *on each of these three days a good deal.* Our firm were depositors in the bank. I never heard the report disputed. It was talked of as a general report. *I heard the sum of* $60,000 mentioned several times. That is the only amount I did hear. I heard in in my office, on the street, and everywhere I went. It was talked about—the probable failures of our prominent men—more than any other subject, or all other subjects put together. *They pointed to Colby more particularly at that time immediately after the failure, than any other one,* unless it was the large stockholders of that bank."

John Harvey testifies: (p. 73).

"That he was creditor of Colby, and *talked with him the forepart of the week following the failure. Colby thought he was on* $30,000 to $35,000 *of Hickox's paper,* but he had kept no minute of the amount. *Heard the report* about the effect on Colby *all over town the forepart of that following week.*"

Chas. A. Demaeyer testifies: (p. 76).

"Am agent of Adams Express Company at Mansfield. Heard the general talk as to effect of the failures on Colby, and his being on Hickox's paper, same day of the failure, and the day following. It was the general talk among all business men. Heard Henry H. Sturges speak of Colby and Hickox being on each others paper. Heard it in my office and elsewhere.

Harvey Hall testifies: (p. 77).

"Known Colby twenty-five years. He was indebted to me $5,000 for U. S. bonds loaned. Was in town *on the Monday following the failures.* I reside in the country. I heard the report that Colby was interested at the bank and with Hickox. *It was reported that it would take him with Hickox* and the bank. *This was on the following Monday, the day* I was in town. Was not on the streets much. Don't think it was on the streets I heard it."

Alexander Morrow testifies: (p. 78).

Deputy Postmaster. "Heard reports before the failure as to the consequence on Colby if Hickox should fail. Talked after the failure, shortly, of the effect of Colby's failure on H. P. Davis.

We have shown from this class of positive testimony, which might have been multiplied indefinitely, that it was impossible from the time, indeed from the hour the bank closed, to even get a breath of fresh air without coming in contact with this omnipresent and all-absorbing comment upon the undisputed fact that Hubbard Colby had gone down in the vortex with his intimate companion, Williard Hickox, and the bank.

Whenever and whatever may have been the official report of what was discovered in the bank vaults, or the *exact* amount of Colby's liabilities, as shown in the bank, it was simply a verification of what had preceeded the official announcement. Whether Colby had the exact figures or not on the 26th day of September, and the day following, they were quoted pretty accurately on the streets, and everywhere, so that the whole community knew he was submerged. And from that day to this, no man need go to the books to read it. During the whole of the week following September 26th, he need but greet his neighbor anywhere in the city and it was the first subject broached, as the startling painful event of the day, and part of the bank failure. Neither Mr. Colby, nor his friends denied or questioned it. Of course, Mr. Colby, a lawyer by education, was shrewd enough when interrogated on the subject, to say he didn't know the extent of his liabilities, and he thought he would go through. It would hardly be expected that he would say he was part of the ruins. He had friends to take care of, and he lost little time in doing it. In the meantime he could cover himself behind the want of exact figures, and say, "I don't know how much I am on of Hickox's paper. I have no memorandum of it." It was not likely that he, or his and Mrs. Barbour's brother-in-law, Mr. Dunn, the experienced and able lawyer, would herald to the public their realization of his situation while they were quietly putting upon record a mortgage upon everything he had left

of any value to secure their sister-in-law and the administration suretics.

An attempt was made by defendants to weaken the great volume of evidence of the twenty witnesses for complainant on this subject. Eight witnesses were called to give their recollection of the time Colby's liabilities became known. We abstract portions of their testimony:

Mr. Scattergood says he mingled with the people but moderately. Had no pecuniary interest in Colby, not a dollar. Has no recollection of dates, but finds his first diary entry October 27, 1873, of talk about Colby being involved. (p. 118).

On cross-examination, (p. 119), he does swear that he recorded in his diary the run on the Richland National Bank, Saturday, 27th:

"Good deal of excitement all day, and much gossip,"—without telling what that gossip was. Sunday he records: "*People's minds more taken up with bank excitement than religion.* Monday, still some excitement." "I would not swear that I had not heard rumors *immediately* following the failures. I find the date I first mentiond his *name*. I would not swear there were no rumors before that."

Had he recorded what he terms "gossip" Saturday, Sunday, and Monday, it would doubtless correspond with the direct and specific current information detailed by others.

Mr. Geo. Blymyer, (p. 119), says:

"It is pretty hard to separate rumors I heard from conclusions I jumped at *from my knowledge of the intimacy of Colby and Hickox, and that their business was so connected that if one went the other would have to go. Should think* it over a week after, that I heard they were on each other's paper for large amount."

On cross examination: (p. 120). "It was generally talked of and reported in Mansfield for some time *prior* to said failures, that Hubbard Colby and William Hickox were very intimate in their social and business relations, and that they were bail and indorsers for each other on business paper, and jointly liable with each other for a large amount on account of the building of the Coldwater R. R. When the talk about Colby commenced it was quite general. I had no pecuniary interest in the matter."

William B. Mercer helps rather than weakens our showing. Says: (p. 122).

"I cannot say *definitely as to time* I heard reports as to Colby. The reports were that *Mr. Colby was involved with Hickox, and would lead probably to his failure.*. It was several days, *probably* a week. *There was so much excitement, I cannot fix definitely the date.*"

On cross-examination: (p. 122). "It was generally talked and known in this community for a long time prior to these failures, that

Mr. Colby and Hickox were very intimate in their social and business relations. * * Considerable excitement immediately after the failure, &c. I cannot swear I did not hear the reports about Colby as early as Monday or Tuesday of the week following the failure."

Wm. H. Harris, (p. 123):

"I recollect of hearing soon after the failure of the National Bank of reports affecting H. Colby, but do not recollect how soon: *think* about a week or ten days. I heard his losses by Hickox would be the cause of his failure."

On cross-examination: "I was not interested in the pecuniary welfare of Mr. Colby, and owned no real estate in Mansfield," &c.

Cyrus Shumway thought it was two or three weeks after the failure, but was not interested in Colby, or Mansfield real estate, and had nothing but recollection to depend on. (p. 125).

John Wood thought it was ten days or two weeks after the failure he heard the reports. (p. 127).

On cross-examination says: "There was a good deal of excitement among business men immediately following the failures, and a good many reports about the solvency of business men. *Think* I did not hear them as early as Monday or Tuesday of the following week, but have *no data* or memorandum, but simply my general recollection of the failure of said bank. It was generally known in the community that Hickox and Colby were very intimate in their social and business relations. Heard it generally reported and talked over that they were largely liable for each other, and jointly liable to a large amount, on account of the building of the Coldwater railroad; but as near as I can recollect, some few days after."

Hiram Harroun, (p. 128), heard them, he thought, a week or more after the failure, but had *no data* by which to fix the time.

Joseph H. Black had no data to fix the time, but *did not recollect* of hearing anything against Mr. Colby for eight or ten days, says:

"It was generally known in the community that Hickox and Colby were very intimate in their social and business relations.

I heard, and it was generally reported and talked, that Colby and Hickox were largely liable for each other as endorsers for each other. *It was generally known that they endorsed for each other.*" (p. 129).

We submit, that testimony of a negative character, given over a year after the occurrences, simply as to the time these general reports of Colby's insolvency were in everybody's mouth, and which rests upon mere want of reccollection as to other dates, by persons having no interest to remember the time, is inexpressively weak, and ineffectual to depreciate the testimony of a positive nature from so

large a number of witnesses, supported by data identifying the days of the week and of the months, when *all* agree in substance, except as to the time.

It thus appears that the insolvency of Mr. Colby was a well recognized fact by that community from the 26th day of September, 1873; and the exciting causes which brought his condition to light, stirred the entire community to comment upon, as well as to deplore his misfortunes, as inseparable from the wreck of the bank, and of his most intimate and disgraced friend, Willard S. Hickox.

Mrs. Barbour knew of the unusual intimacy in a social as well as a business way, that had existed between those two men. She knew that Mr. Colby had named his son after Willard Hickox, and Hickox had named his son after Hubbard Colby.

It is shown that she could not have gone upon the streets and among her intimate acquaintances and relatives on the day of the bank failure, and the days intervening prior to her being informed of the execution of these mortgages; and could not have met Mr. Colby, (and Mr. Dunn, her attorney from a neighboring county seat, who advised with Mr. Colby in her interests, and was present at the execution of the instruments (Clugston, p. 75), and told her of their execution); and her brother and nephew, and other near neighbors who had interested themselves in Mr. Colby's financial condition; and she could not have seen the excitement everywhere, and heard of the downfall of Hickox and the bank, as she testifies she did, (p. 84). without being informed of Mr. Colby's ruin at the same time. Her testimony that she did not hear of Mr. Colby's insolvency until later, we think too improbable to accept, as opposed to all that is thus developed.

On the very evening of the day of these startling discourses, Mrs. Super, who lived across the street from Mrs. Barbour, asked her "*if she was frightened. 'She said she knew where her money was.'* She started right home." (p. 20).

Patrick P. Ford, her grocer, who testified to the general reports in circulation within two days after the breaking of the bank, that Colby had endorsed a great many notes for Hickox, and the consequence that it would break Mr. Colby, says: (p. 51). His place of business was about seventy yards from her residence, and he had a conversation with Mrs. Barbour on the subject of Mr. Colby's financial condition.

He says: "Mrs. Barbour asked me what the general opinion was, and I told her that I thought that it would use Mr. Colby up. * * * "I said the public opinion was that it would use Mr. Colby up. As for myself, I could not say, &c.

Ques. Supposing the failure to have occurred on Friday, the 26th day of Sept., 1873, when would you say that the conversation that you have testified concerning, took place? Ans. About the first of the week following." (p. 52).

On cross-examination, he said he talked with Mrs. Barbour on the subject of Mr. Colby's breaking up, as much as a dozen times. The first time, about the first of the week following the First National Bank failure, at Mrs. Barbour's house. (p. 53). In one of the half-dozen talks he had with her, (but which one he could not say), she said Mr. Colby told her her matters were all fixed; that Mr. Colby had made her secure with mortgages, but she had not them in her possession, and she thought she was all safe. She did not know where her security was, or what it was on, but Colby said she was secure. (p. 54).

Mrs. Barbour is very indefinite in her testimony as to information she may have received on the subject of Colby's financial condition. She does not deny having had the conversations with Mrs. Super, and Mr. Ford. She simply says she don't know whether they occurred or not. (p. 85).

She cannot remember conversing with them or others on that subject prior to Mr. Dunn's informing her of the mortgages.

She did not directly authorize any person as her agent to obtain the mortgages. If that relation is not attributable to either Mr. Colby or Mr. Dunn, so as to bind her with such information as reached them at the time the mortgages were delivered for record, then her rights in law are effected by all her cause of belief, information, and surroundings at the later date when information of the execution of the mortgages came to her, and she was put upon her election to affirm or repudiate the transactions had for her benefit.

She is unable to state when Mr. Dunn informed her of the mortgages, nearer than "about October 1st." She knew nothing of their contents until some time after that. Yet, she nowhere directly denies having heard the general information which surrounded and was imparted to her, *before she knew of the mortgages*. She says she *knew* nothing about Colby's indebtedness on October 1st, 1873. Her actual *knowledge*, as we have seen, was not necessary. Her indefinite and unsatisfactory denials, based upon the frailty of her memory, running through her entire examination, are quite unsafe to overthrow complainant's showing. She was previously warned of the risk and dangers her interests were subjected to in Mr. Colby's hands. And, when her friends had a year or more before inquired what security she had, she went to her brother, Lester Armentrout, and told him of her friends' inquiries, when she was informed she could have another administrator appointed. (L. Armentrout, p. 27).

She says she never allowed any person to talk with her on the subject of those dangers, because she "thought they were meddling with something which was none of their business."

She wilfully closed her ears, then, to shut out all information.

If from these facts, standing alone, the case is not entirely clear, that she had reasonable cause to believe Mr. Colby was insolvent, and that his acts of preference were in fraud of the Bankrupt Act, another view of the case, we submit, leaves no reason for doubt as to these mortgages being prohibited and void.

THE UNUSUAL CHARACTER OF THE TRANSACTION RAISES THE PRESUMPTION OF FRAUD.

Section 35 of the Bankrupt Act closed with this clause:

"And if such sale, assignment, *transfer* or *conveyance* is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud."

Sec. 5130, Rev. Stats. embodies the same provision, and relates to all classes of transactions prohibited by section 35, *supra*, or by sections 5128 and 5129, Rev. Stats.

"A conveyance out of the ordinary course of business is sufficient evidence if uncontrolled, to establish a knowledge of the debtor's insolvency. The purchaser is put upon inquiry, and should take steps to ascertain the condition of the debtor, or at least his general reputation as to solvency."

Bump on Bankruptcy, 10 Ed., 832, notes and cases cited.

Also, *Rison vs. Knapp*, 4 B. Reg., 349; s. c. 1 Dillon, 186.

Wilson vs. Stoddard, 4 B. Reg., 254.

Warren vs. Del. L. & W. R. Co. 7 B. Reg., 451; s. c. 10 Blatch., 493.

"If the transaction is unusual in *time*, *place*, *price* or *character*, &c., or *in other respects*, having reference to the then business of the debtor, such facts as against the vendee, shall be *prima facie* evidence of fraud." Bullock J. *In re Joseph D. Hunt*, 2 Bk. Reg. p. 116.

The business relations between Mr. Colby and Mrs. Barbour commenced upon the former's appointment as administrator of Justus S. Barbour, January 31, 1866. He received all the assets of the estate as administrator in 1866.

He gave a bond before entering on the execution of his trust, in

compliance with Sec. 13, of the statute of Ohio. 1 Swan & Sayler, Sup't. Stats. p. 351, which reads as follows:

"Sec. XIII. Every administrator shall, before entering on the execution of his trust, give bond, with two or more sufficien sureties, in such sums as the court shall order, payable to the State of Ohio with condition as follows:

First.—To make and return into Court, on oath, within three months, a true inventory of all moneys, goods, chattels, rights and credits of the deceased, which have or shall come to his possession or knowledge; and also, if required by the Court, an inventory of the real estate of the deceased.

Secondly.—To administer according to law, all the moneys, goods, chattels, rights and credits of the deceased, and the proceeds of all his real estate that may be sold for the payment of his debts, which shall at any time come to the possession of the administrator, or to the possession of any other person for him.

Thirdly.—To render, upon oath, a true account of his administration, within eighteen months, and at any other times when required by the Court or the law; and failing so to do for thirty days after he shall have been notified of the expiration of the tim by the Probate Judge, he shall receive no allowance for services, unless the Court shall enter upon its journal that such delay was necessary and reasonable.

Fourthly.—To pay any balance remaining in his hands upon the settlement of his accounts, to such persons as the Court or the law shall direct; and

Fifthly—To deliver the letters of administration into Court, in case any will of the deceased shall be thereafter duly proved and allowed."

This section, by the requirement of those conditions in the bond, lays down the duties of an administrator in Ohio; and secures faithful performance thereof by such *bond, with personal security*, to be approved by the Probate Court.

The first being the filing of an inventory and appraisement. Secondly to administer, according to law, the assets, by paying all debts of the deceased and costs of administration.

The insignificant amount of debts and expenses against this estate were paid at once out of the abundance of assets in his hands at the time of his appoiniment. What was his next duty? To render, upon oath, a true account of his administration within eighteen months, and at such times as required by the Court, under penalty for non-compliance. Then what? To pay any balance remaining in his hands upon settlement, to such persons as the Court or law should direct.

How did Hubbard Colby discharge these duties? He filed no

account and made no settlement with the Probate Court until October 6th, 1873—over seven years and a half after his appointment.

The statutes and adjudications in Ohio will be searched in vain for any authority, expressed or implied, for his *investing* any of the moneys of the estate on any kind of security.

Instead of paying over to the widow, and guardian of the minor heirs, their readily ascertained shares of the distributive fund, as the law and his bond required, he ignored both; and, without any sanction whatever, he used the money in his own private speculations, in stocks and otherwise, *for over seven years, until the crisis came.*

Did he then perform his duty? Not at all. What new light dawned upon his conscience or legal perception *then*, that induced the belief that in failing for seven long years to supplement his statutory bond with a mortgage on all of his real estate he had been derelict of duty?

He was asked to explain: (p. 108 rec., q. 201j).

Ques. "Then you would understand the law, as requiring you to make a final account and pay over the money to the heirs-at-law and legal representatives, would you not?

Ans. After paying the debts and selling the estate, it would have been my duty to have filed a final account.

Ques. Was there anything to prevent you from filing your final account for some three years before you did? If so, what? Ans. *Do not recollect of anything.*

Ques. Then, if for those last three years you were prepared for, and by law required to file your final accounts and pay over the moneys, why did you not do so, and thereby have them invested in the manner in which you say the laws requires funds of that sort to be?

Ans. *I do not know any reason that now occurs to me.*"

When asked to state definitely in what the money was invested for those years before his accounting, he answered: "*I was using it in my business as I was my own funds and others that I may have borrowed.*"

He was given an opportunity to explain how it happened such a quickening sense of duty prompted the execution of the mortgages at this moment of his revulsion of fortune. No action in the Probate Court was taken against *him* as administrator. None is claimed. But defendants produce two letters from the Probate Judge; (found on p. 80 rec.) the first dated June 11th, 1873, *addressed to Mrs. Barbour.* For convenience we here give copy:

"OFFICE OF PROBATE JUDGE,
Mansfield, Ohio, June 11, *A. D.* 1873.

Mrs. M. Barbour, guardian of May Barbour and Maggie Barbour and Justus L. Barbour:

A request has this day been filed in the Probate Court, asking that you file a final account of your guardianship, showing fully all receipts and expenditures, and also showing the amounts of the distributive shares of said minors from the estate of J. S. Barbour, deceased, and whether the estate of said wards is invested according to law. Also, you are requested at the same time to file a new bond, as said guardian; Andrew S. Newman, one of your bondsmen, being now deceased. Hoping you will attend to this immediately and save the costs of citation, I remain yours, &c., H. D. KEITH,
Probate Judge."

This, not directed to Colby, issued nearly four months previously, simply informed Mrs. Barbour of the necessity of filing a new *guardian's* bond and a settlement account as guardian, showing how *she* had the funds of her wards invested.

She complied, so far as to give a new bond promptly, but did not file her account.

If this could by any assumption be regarded as a goad to Colby, he did not heed it. He slept upon it so far as his account was concerned, until he saw insolvency upon him, nearly four months later.

The other letter of September 29, 1873, likewise addressed to Mrs. Barbour, is as follows:

"OFFICE OF PROBATE JUDGE,
Mansfield, Ohio, Sept. 29, *A. D.* 1873.

Mrs. Mellissa Barbour:

The law requires that upon a guardian filing a new bond, at the same time a settlement of the estate of his wards should be filed. You filed a new bond in June last, but have neglected to file your settlement of the same date. Please file it at once, to-day or to-morrow, and save the additional costs of citation. Yours, &c.,
H. D. KEITH,
Probate Judge."

This, it is said, being handed to Mr. Colby the same day, necessitated or moved him to giving the additional security attempted October 1st. We inquire: Did this call upon Mr. Colby to go straightway and execute to Mrs. Barbour, in her behalf, and as guardian, the mortgeges on all his property, securing to her a preference to the amount of $23,000, for a liability already provided for and secured by a statutory bond? His administration sureties were holden for the

entire sum, as undisbursed, under the "fourth" condition of their bond.

It cannot be contemplated that *both* sets of sureties shall be liable for the same fund at the same time.

Mrs. Barbour was not yet charged with the investment of funds in the administrator's hands. She never did invest them or charge herself with them. She complied with this last notice, but showed no investment by her of what was in Colby's hands. *He* must first comply with condition "fourth" of his bond. But, instead of doing so, he kept the money, as for long before, in his "business" speculations. And, as he says and appellants claim, without any solicitation from any source, but out of his own regard for law and duty, he supplied what the law of his duties never contemplated,—two mortgages superadded to his bond, conditioned substantially as the bond. After reciting his appointment, the present existence of the trust, and that $22,722.20 remains in *his* hands *as administrator* due to Melissa Barbour as widow and as guardian, the condition of the mortgages read:

"Now if the said Hubbard Colby shall well and truly pay to the said Melissa A. Barbour the amount of money in his hands, *as he is required by law to do*, then these presents shall be void, otherwise to remain in full force and virtue."

The answers of the appellants, the printed argument of their solicitor, and the settlement accounts filed October 6th by Colby as administrator, and by Mrs. Barbour as guardian, all support the theory of the mortgages; that the funds secured were still in Colby's hands *as administrator*, undisbursed; and nothing but performance of his ordinary duties of administrator was attempted to be secured by the mortgages. Yet, counsel for appellants seeks protection against the extraordinary character of such *extra*-statutory security, under the *guardian's* act prescribing the duties of guardians in the investment of their wards' estates. The statute (Ohio laws, V. 69, p. 56) is cited, but nothing in this will be found relating to administrators' duties.

How did Mr. Colby himself explain the application of the statutes as inducement to his giving this security? After stating that he had no recollection of any person mentioning the subject of his giving the mortgages before they were executed, he was asked: (p. 108, q. 201 f).

"If you regarded yourself as solvent, why did you give this mortgage?

Ans. The laws of this state require that such funds should be invested in either U. S. or state securities, or be secured by mortgage on real estate, and it was done in order to comply with the law.

201g.—Q. Where do you find any laws requiring an administrator to thus invest the estate?

Ans. *I do not know that there is any such law!*"

If the law relating to *guardians* could by any stretch be applied to an *administrator*, how was he complying with it? He, the party assumed to be required to *make* the investment and *take* security, appropriates the money to *his own speculations*, and *himself* GIVES mortgages upon real estate already mostly incumbered to its full value, if buildings are excluded; and by these mortgages more than consuming the value of improvements and all.

If the unfounded assumption was good as applied to an administrator *quoad* a guardian, how could it apply to his relation toward Mrs. Barbour in her own behalf, who had nothing but the *ordinary* statutory bond for her protection?

Counsel has not cited us to any provision of the law recognizing real estate or mortgage security in lieu, or in aid of the statutory administrator's bond. The statute of Ohio enacts ample provisions for requiring additional security when the sureties in any bond of an administrator shall be insufficient, on the petition of any person interested; also for the discharge of any surety on such bond, after the expiration of six years from its date, upon proper petition; when a new bond may be required. It also provides for compulsory execution of a bond of indemnity from any administrator unfaithful to his trust, to his sureties, on application of the latter to the Court granting the letters, and for removal for noncompliance.—*Vide* Swan & Critchfield, Rev. Stats. (1860) 605, Secs. 191, 192, 195. But *in all instances* a *bond* with *personal sureties*, is required.

The frailty of such a shelter as affording a pretext for this preference, and the extraordinary circumstances under which it was given, in view of the well known *ordinary* course of business of an administrator, must be apparent without any further comment.

The appellants ask the Court to find that Hubbard Colby in executing the mortgage in question, securing the performance of duties clearly defined by law, and secured by expressly required *statutory bond*, exclusive of all other modes of security, was proceeding in the ordinary and usual course of business of an administrator dealing with his *cestuis que trust*, at a time when he had appropriated to his own uses the funds secured, and was then unable, and had failed

for years, without legal excuse, to perform the condition of his bond and the duties of his office.

Superadded to the foregoing, are other extraordinary appearances connected with the giving of these preferences.

Mr. Colby testified that the mortgages were not asked for by Mrs. Barbour or any person on her behalf. (p. 107).

Mrs. Barbour testified, (p. 83) that Mr. Colby never talked to her about the mortgages. She never asked for a mortgage or any security other than the law had required at the time of Colby's appointment. She never authorized any person to receive a mortgage for her or put it on record, and never requested any person to act for her prior to her being informed of the execution of the mortgages.

The execution of the instruments, as well as the recording of them, the amount intended to be secured, to whom executed, and upon what property, were all unknown to her until some time after. She subsequently learned from different sources—first, from Mr. Dunn of the execution of the mortgages, and later, from friends and neighbors, their contents. Rec. p. 84.

She did not know that she inquired why it had been done, or that she was told why. It is not claimed that the incentive or *legal* (?) pretext advanced by Mr. Colby and followed by counsel, was explained to her; or that any supposition that the mortgages were given in compliance with usual duty or matters of form, found place in her mind.

Ignorance of legal requirements and presumptions relating to such business, is claimed for her, in exhoneration from ordinary accountability. It is said she made no inquiry, and gave the matter no thought. She testifies, (p. 88) that when she had any business to attend to, Mr. Colby did it; and she had no other agent.

Under these circumstances Mr. Colby draws up the mortgages upon substantially all his real estate, encumbering it to more than its worth; calls in a notary, has it executed, and *he* sends it by the notary to the recorder at once; thereby without consultation with the mortgagee, perfects an incumbrance in her favor, claimed to the exclusion of all other creditors whom he then knew had nothing left upon which recourse could be had to collect their claims.

He did not even inform her of what he had done, or explain any necessity or reason for it; (if appellants' theory is accepted)—leaving her to find it out from other sources, while he passed her dwelling place several times a day.

Verily, are not these circumstances, independent of the many

others referred to, extraordinary, and out of the usual course of business, for any debtor, and sufficient to bring this case within the closing clause of Sec. 35, *supra*.

We invite the attention of this Court to the reasoning of the Court in the case of *Graham vs. Stark*, 3 Nat. Bk. Reg. 357, where the policy of the clause of Sec. 35 referred to, is vindicated and applied to a like case with such good sense, that we beg the privilege of quoting its language as better than we can substitute.

It was called forth by a state of circumstances in that case similar to the main facts relied upon by Mrs. Barbour in this. viz:

Stark claimed, under a mortgage to him from the bankrupt, to secure a debt upon which he held personal security; also a balance not so secured.

The bankrupt having a desire to save the bail, as well as to secure the balance unsecured to S ark on open account, executed the mortgage in question to Stark, without Stark or the bail having asked such security, or any solicitation whatever; when the mortgagee supposed the debt perfectly safe, had no knowledge of the bankrupt's condition, made no inquiries on the subject, and supposed the mortgage was offered more for the indemnity of the surety as to the larger part of the debt.

In applying the provisions of the statute to that state of facts, the Court (Hall, Justice), says:

"The utility and justice, not to say the necessity of the provision, "which renders securities, &c., given out of the ordinary course of "business, *prima facie* fraudulent, is well illustrated in the present case. "This *prima facie* evidence is present to every creditor who accepts a "security in any case to which the provision is applicable; and unless "the creditor has evidence with which to repel this presumption, he "has reasonable cause to believe that the security is fraudulent and "void under the bankrupt act. This will necessarily prevent any "security, voluntarily given by an insolvent to a favored creditor, "from being held valid simply because it proceeded from the voluntary act of the debtor, and was prepared and delivered without any "previous communication with the creditor, either in regard to the "giving of security or the financial condition of the debtor.

"If a debtor can effectually secure any favored creditor by this one-"sided and unusual mode of proceeding, it is likely to be resorted to "in every case where the creditor (in consequence of a previous understanding with his debtor, *or of the debtor's known disposition to "secure him against loss* to the prejudice of his other creditors) is "willing to rely upon the favorable disposition of his debtor, and to "be wilfully ignorant of his financial condition. And the statutory

"provisions of the bankrupt act, which were intended to invalidate "the unjust preferences and to prevent all the other frauds growing "out of the validity of general and partial assignments for the benefit "of particular creditors, would be evaded and defeated with ease and "certainty. This case shows the propriety of the provision, and the "manifest duty of the Court to give to it the effect which it was the "intention of Congress should be given to it. A creditor cannot by "shutting his eyes when this statutory *prima facie* eveidence of fraud "is to be placed before him, escape the consequences of this provis- "ion. When he accepts a security he is conclusively presumed to "know what appears upon its face, and to have reasonable cause to "believe it was intended to accomplish what must be its ordinary and "necessary effect, *and no* '*masterly inactivity*,' no self-imposed igno- "rance of what the circumstances call upon him to ascertain, how- "ever intense, and however closely guarded and carefully cherished "that ignorance may be, can make fraudulent preferences like those "attempted to be given in this case, valid and binding as against the "assignee in bankruptcy, while the 35th section of the bankrupt act "remains in force."

We submit, that the views and principles here announced, commend themselves as necessary to give full effect to that clause of the bankrupt act.

When we look at the transactions in question with the double aspect presented by the admitted facts, (of this insolvent and defaulting administrator attempting to supplement his statutory security—a bond, with mortgages upon like condition for the performance of his statutory trust duties, executed and caused to be recorded upon his own voluntary, unsolicited care for the creditor without even communicating with her on the subject before, or informing her for some time after the mortgages were recorded, she being left to ascertain the facts from third parties not interested in the business, while he had many opportunities daily of communicating the facts, and at *such a time* when grave disaster and financial ruin had overtaken the most intimate, business and social companions of the debtor—the entire community taking alarm and excitement at events made public), it seems to us the Court must draw the same conclusions, that a *prima facie* case of fraud was presented to the recipient of such favors, which cast upon her the legal duty of investigation if the statute did not *proprio vigore* raise the presumption from the facts.

The statute cast upon Mrs. Barbour the *legal duty* of inquiry. Unless it is shown that she did pursue all reasonable means to ascertain Colby's financial condition, or at least his reputed condition at the time, she stands charged with *knowledge* of his insolvency and the fraudulent purposes and effect of the preferences.

This is the doctrine enforced by this Court in *Walbun vs. Babbitt*, 16 Wall, 577.

We quote from the opinion by Mr. Justice Davis:

"The presumption of fraud arising from the unusual nature of the sale in this case can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. All reasonable means, pursued in good faith, must be used for this purpose. If Summerfield had employed any means at all, directed to this end, he would have discovered the actual insolvency of Mendelson.

In choosing to remain ignorant of what the necessities of his case required him to know, he took the risk of the impeachment of the transaction by the assignee in bankruptcy, in case Mendelson should, within the time limited in the statute, be declared a bankrupt."

It is not claimed in the case at bar that Mrs. Barbour used *any* means or made *any* effort whatever to ascertain Colby's financial condition. It is not even claimed that she was advised of the flimsy pretext put forward by Colby. She purposely shut her ears and turned away from the flood of light and information pouring in from all quarters, which convinced everybody else not so deeply interested in knowing. If she rejected the general reputation of Mr. Colby in the community, and had inquired into the character of the security then thrust upon her, the value of the real estate mortgaged and the prior incumbrances thereon; and had asked Mr. Colby who had his stocks; and the amount of his indebtedness, (including that for Hickox and the railroad company of which he had knowledge, and gave Mr. Harvey and others information immediately after September 26th), she would have been informed of debts amounting to nearly three times the value of his property. Her blind confidence in Mr. Colby, and utter neglect of *every* care; her abandonment of duty, in trust that Mr. Colby would take care of her if misfortune should overtake him, cannot absolve her from the legal duty imposed by the circumstances of this case.

"It needs no argument to prove that if the law against fraudulent preferences could be evaded in this way, it would furnish no sort of protection to creditors." Davis J, *supra*.

The presumption of law *must* attach whenever the Court can find the transaction to be one in its nature *unusual* and out of the *ordinary course of the business* of the debtor to which the transaction relates, whatever the creditor may have in fact inferred, or whether she in fact inferred anything. She must be viewed in the light which the law

places every credtior in.—*Vide Colburn vs. Proctor, supra*, and other cases cited.

Another legal view might be taken of the relation claimed by Mrs. Barbour between Mr. Colby and herself. Hubbard Colby had been her only agent for the transaction of her business as guardian. He had received all papers sent to her by the Probate Court relating to that business, with the general request to attend to the business. (Rec. 79–88). It is claimed she had every confidence and trusted in his management of her affairs. That he, of his own regard for her and her interests, prepared and caused to be recorded, the mortgages in controversy without her attention to the business. If these are true, then Mr. Colby acted under the principles of agency in her behalf. He was not acting in the attitude of one adversely interested in the business. He was not to be benefited by the transaction. The beneficial features of his acts all enured to Mrs. Barbour and her children.

In thus confiding her business to him and subsequently ratifying his acts for her benefit, she made him her agent, and his knowledge of his own condition and intentions became her knowledge. The only delivery made was to the Recorder of the county by the notary public, at Mr. Colby's request. If this delivery is taken as the time the instrument took effect, Mrs. Barbour is said to have had no knowledge of the fact at the time the incumbrance is claimed to have attached. It cannot be that the Recorder's knowledge or ignorance could affect Mrs. Barbour's rights. Is she not then bound by the knowledge of Colby at the time he acted in her behalf in placing the mortgage upon record? Can she avail herself of the benefits and fruits of his acts without being charged with his knowledge and surroundings, as her agent?

The rule that notice to an agent is notice to a principal, applies where the agent is employed by both parties to the transaction.

Le Neve vs. Le Neve, 3 Atkyns, 464;

Toulmin vs. Steere, 3 Mer. 210;

Fuller vs. Bennett, 2 Ha. 394;

Dryden vs. Frost, 3 M. & C. 670;

Roddy vs. *Williams*, 3 J. & L. 16;

Frail vs. Ellis, 16 Beav. 350;

Tweedale vs. Tweedale, 23 Beav. 341;

Alterburry vs. Wallis, 8 D. M. & G. 454;

Oglive vs. Jeafreson, 2 Giff. 353;

Spraight vs. *Cowne*, 1 H. & M. 359;

Boursot vs. *Savage*, L. R., 2 Eq. 134.

The same rule has been applied where the vendor himself acted as agent.

Sheldon vs. Cox, Amb. 624;

Dryden vs. *Frost*, 3 M. & C. 670;

Majoribanks vs. *Hovenden*, Dru. 11;

Robinson vs. *Briggs*, 1 Sm. & G. 188;

Re Rorke's Estate, 3 Ir. Ch, 371.

In *Jennings, Executor*, vs. *Blincorne, et al* 2 Vernon, 609:

Blincorne, in treating for himself with Whitlock for the purchase of copy-hold lands, received notice of a prior surrender by Whitlock (which had not been presented according to the custom of the manor, and was therefore void as to innocent purchasers) and to avoid the effect of his notice took a surrender in the name of Moore, (who knew nothing of the purchase until after it was made) that he might be paid a debt, which Whitlock owed him, out of the purchase money. Moore subsequently consented to become purchaser, and paid the consideration money, and pleaded himself to be a purchaser without notice.

The Lord Chancellor decreed in favor of the prior surrender, holding the notice to Blincorne notice to Moore.

I have, since most of the foregoing argument was prepared, been furnished with the argument submitted by counsel for appellants, which requires that I should notice briefly some points advanced:

1. It is claimed that the amendatory act of June 22d, 1874, governs this case, requiring complainant to establish, by proof, Mrs.

Barbour's *knowledge* that the bankrupt intended a fraud upon the act in making the preferences complained of.

Under the views I have advanced, it matters little which statute is applied, if I have rightly apprehended the force and effect of section 5130.

But the adjudication of bankruptcy against Mr. Colby was entered December 16th, 1873, on a *petition filed November 5th*, 1873.

This case is within the saving clause of the act of June 22d, 1874, implied from the expressed retroactive provision. *Expressio unius exclusio alterius.* The language: "And the provisions of this act shall apply to all cases of compulsory or involuntary bankruptcy commenced since the 1st day of December, 1873, as well as those commenced thereafter," evinces a clear intention to save all rights in or based upon proceedings or adjudications had on petitions *filed before December 1st*, 1873.

By the provisions of the act, the rights of action and property titles vesting in the assignee by the assignment, relate back to the time of filing the petition for adjudication.

The cases: *Singer vs. Sloan*, 11 N. B. R., 433;

Booth vs. Brook, 12 ib., 398;

Singer vs. Sloan, ib., 208;

from which counsel for appellants quotes largely, are not in point.

Referring to *Hamblin vs. Pettibone*, 10 Bk. R. 172, where the Court held that the amendment did not apply, where in an involuntary case, an adjudication was had, and suit by the assignee was pending against a preferred creditor prior to December 1, 1873, counsel concludes: "Nothing but a *suit pending* by the assignee *prior* to December 1st can prevent the amendment from operating." We answer: *non sequitur.*

In *Singer vs. Sloan* the petition in bankruptcy was not filed until January 21st, 1874. The transaction sought to be impeached was on December 18th, 1873.

In *Booth, assignee, vs. Brook*, the mortgage was executed January 31st, 1874.

As I have already extended the argument to an extent taxing the patience of the Court, I refer the Court to the case of *Tinker vs. Van Dyke*, 14 Bk. Reg. 112, for a full discussion, where the question under consideration was exhaustively argued by able counsel. The

opinion by Judge Emmons reviews and distinguishes all the authorities, criticises the opinion by Judge Dillon in *Singer vs. Sloan*, (so largely quoted by appellants' counsel), and supports the contrary doctrine for which we contend. He there says: (p. 117). "Upon authority the question comes before us with six well considered judgments, holding directly upon the question before us, that the amendment did not apply to proceedings in bankruptcy commenced before December, 1873. The *dictum* of Judge Dillon is all that we find opposed to it."

There the suit of the assignee was not commenced before the amendment. The syllabus is as follows:

"The clause of section 5021, amending section 39 of the Bankrupt Law, by inserting the words '*knew*' instead of the words had reasonable cause to believe, is not to be applied to proceedings in bankruptcy commenced before the first of December, 1873.

Those clauses of the Bankrupt Law which authorize an assignee to recover the amount of unlawful preferences paid to particular creditors, are not in their nature penal, and their repeal is not subject to the rule of construction applicable to the repeal of penal statutes.

When substantial rights are created by statute, or commercial contracts are regulated, the repeal of laws upon which they depend will not receive a retroactive application, unless the law expressly or by necessary implication, so declares," &c.

Vide also:

Oxford Iron Company vs. Slafter, 14 B. R. 38; s. c. 13 Blatch, 455;

Barnewall vs. Jones, 14 B. R. 278;

In re John F. Lee, ib. 89;

Slafter vs. Sugar Refining Co., 13 B. R. 320;

Hamlin vs. Pettibone, 10 B. R. 172;

Brooke vs. McCracken, ib. 461;

Warren vs. Garber, 15 B. R. 409.

The averments in the bill of complaint of *knowledge* on the part of Mrs. Barbour do not determine the application of the statute. Knowledge *ex vi termini* includes *reasonable cause* to believe. If the former import is not supported, the latter being established is sufficient.

Section 13. Rev. Stats. is conclusive upon the question as to the effect of the repeal of the provisions of the original bankrupt act.

Sec 13. "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or *liability* incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture *or liability*."

Counsel for appellants refers to the testimony respecting the general reputation of Mr. Colby's financial condition as mere *rumors*. It will be found that the knowledge, it is shown the community possessed, was not *disputed* by any person, and was the truth. It induced belief in the minds of all classes in the community.

The quotation from Sugden on Vendors to the effect that notice must come from persons interested in the property in order to effect the purchaser's conscience, applies only to *notice* in its *most limited* sense, as distinguished from *knowledge*, or such information as is substantially equivalent to knowledge. Where knowledge, or reasonable cause to believe, is brought home to a party, it is immaterial whether it is obtained from parties in interest or from third persons.

"From whatever quarter it may proceed, it will be sufficient if it be so definite as to enable a purchaser to ascertain whether it is authentic or not, and sufficiently clear and definite as to put the purchaser on inquiry and enable him to conduct the inquiry to an ascertainment of the fact. The statements of third persons may be sufficient for this purpose. The existence of a fact may acquire such a general notoriety as to have the same effect upon a question of knowledge or belief."

James vs. Drake. 3 *Sneed*, 540;

Martel vs. Somers. 26 *Texas*, 551.

Vide also; *Conover vs. Berdine*, 69 Mo. 125 (33 Am. Rep. 496), and cases cited;

Sheen vs. Bumstead, 1 H. & C. 357.

On this subject it is said: (1 Story's Eq. Jur. § 400 b. 10 Ed.) "It is not indispensable to the validity of notice of an equitable interest that it should come from the party or his agent. It is sufficient if it be derived *alliunde*; provided it be of a character likely to gain credence. In regard to the inquiry required of a party, it

should be such as a *prudent* and *careful man* would exercise in his own business of equal importance."

It has not been claimed on behalf of complainant that "a failure of *utmost circumspection* shall have the effect of postponing a party as if he were guilty of fraud or had actual notice."

I contend for the application of the well-settled general proposition that if facts are brought to the knowledge of a party which would put him as a man of common sagacity or ordinary prudence upon inquiry, he is bound to inquire; and if he neglect to do so, he will be chargeable with knowledge of what he might have learned upon examination.

In addition to the authorities cited, we refer the Court to *Dutcher vs. Wright, assignee*, 94 U. S. (4 Otto), 553, where the doctrine quoted from *Scammon vs. Cole*, 5 N. B. R., 257, (Arg't. *supra*, p. 15), is reiterated in the opinion by Clifford J.

Appellants contended that *active* fraud or "fraudulent and willful blindness" must be established. The language of V. Chancellor in *Jones vs. Smith*, 1 Hare, 43, is quoted. The rule on the better and later authorities is stated in 10 Ed. Story's Eq. Jur. § 400b, as follows:

"The rule with respect to the consequences of a purchaser abstaining from making inquiries, does not depend exclusively upon a fraudulent motive. A man may abstain from mere heedlessness or stupedity, and be none the less responsible for the consequences; but if he make reasonable inquiry, and is deterred by a false answer, he is excusable, if it be of a character to delude a prudent man. *But* if he make no inquiry, he is not to be excused upon the ground that a false answer or one leading to no result would have been given if he had inquired. This cannot be known."

It is contended by appellants' counsel that these mortgages must be sustained upon the theory that the moneys secured were trust funds, and no part of the estate of the bankrupt to which creditors were entitled.

Voyles, Assignee, vs. Parker, (Chicago *Legal News*) is cited to sustain the position.

In that case the Statute of Indiana made the claim on an administrator's bond a lien on the property of the administrator from the day a suit was commenced upon it. Suit was commenced on the bond April 27th, 1876. The petition for adjudication was filed June 6th, following.

The Court in holding that the lien created by statute would be upheld as against the assignee in bankruptcy, was simply giving effect to a state statute. It did not proceed upon any theory of recognizing a security *created by the bankrupt* after his insolvency, upon property as to which neither the law nor the facts justified the enforcement of a specific trust.

It is not pretended, in this case, that the funds in Colby's hands as administrator are traceable to any particular or specific part of his property, much less to the property mortgaged If the case could be brought within any of the rules under which resulting trusts are declared and enforced in equity, I could see some force in the suggestion that the property encumbered was not subject to the claims of general creditors or the assignee representing them.

While it is true that a fund may be followed with a trust so long as its general character can be identified, yet when the means of identification fail,—"As when an executor converts an estate into money, and mixes it with the general mass of his own money, and there is no identifying the particular money of the trust, the distributees or legatees have no preference over his other creditors, but they must prove their claims."

Perry on Trusts, § 128.

"The right only ceases when the means of ascertainment fail; which of course is the case when the subject matter is turned into money, and mixed and confounded in a general mass of property of the same description."

Story's Eq. Jur., § 1259.

In this case no attempt was made by defendants to trace the funds, or identify them in any form of property.

When Mr. Colby was asked what he did with the money into which the assets of the estate had been converted, he answered:

"I was using it in my business as I was my own funds, and other funds that I might have borrowed." (Rec. p. 108.)

Under this state of facts Mrs. Barbour's equity was no stronger than that of general creditors.

It is said that Mr. Colby had no *intent* to *prefer* Mrs. Barbour by the mortgages in question. That he expected to "go through" until some time after the 1st of October, 1873. That he continued to carry on business *as usual* up to the time proceedings in bankruptcy were commenced against him. That he sold property and paid debts.

On the contrary it is shown that he could not have reasonably expected to be able to pay the liabilities he contracted as *principal debtor*, leaving out the debts he was bail for. He knew the Hickox paper would all fall upon him. While he says he had not the *exact* amount of Hickox's paper he was on, he acknowledged immediately upon the failure of Hickox, it was not less than $30,000 to $35,000, as he told Mr. Harvey the *first of the* week after the bank failure. (p. 74). He had himself said he would "have to rub out his slate and begin anew." He knew that in putting these mortgages on record the world must know he had nothing left unincumbered for his unsecured creditors, except three other small pieces of real estate, one of which he conveyed to his attorneys in payment of fees, and with the others preferred an importunate creditor, Dr. Jones, a few days later.

He knew that he was liable for over $50,000 he (with others) had borrowed in a railroad enterprise, of which a portion was past due and could not be renewed. That the railroad enterprise was involved in litigation, and the panic had stopped all hope of its completion. It was no longer a "going" project. He was a director of the company, and had full means of knowing the unavailable character of the resources relied upon by the borrowers to reimburse themselves for the borrowed money they had advanced. (See H. H Sturges' testimony, pp. 66-71). He knew that he was liable, as surety for his son and son-in-law, for about $20,000 of other debts. (Rec. p. 89). The last money he was able to borrow was that from Beverstock on a mortgage of his homestead. He was even compelled to go to New York City and surrender some life insurance policies to raise about $1,200. His resources were exhausted. The $6,000 check he gave Mr. Grimes in the middle of August for borrowed money, due in thirty days, had gone past due, and when Mr. Grimes demanded it the first or second week in October, Colby could only pay $400 of it; and *that* was part of the cash received on surrender of his life insurance. (pp. 143-109). He had immediately on the failure of Hickox abandoned his usual occupation as managing financial officer of the Mansfield Machine Works, for which he was paid a salary of $2,000 a year, and was not seen at the company's office after that; (N. Abbott, p. 136) although its condition and business was in greatest need of attention. It is preposterous to suppose that a man of Colby's sagacity, in the midst of such a panic, with his surroundings, did not contemplate his real condition.

The disposition of the lot in St. Louis and the small property in

Mansfield he made to Dr. Jones, to whom he owed over $5,000, which counsel refers to as evidence of his continued transaction of business, and absence of intent to prefer, which, it is said, the assignee had knowledge of, was but one of his acts of preference which has since been annulled at the suit of the assignee, and furnished evidence of its fraudulent character upon its face; the debt not being due at the time he prevailed on Colby to pay it by transfer of the remnant of his estate.

The payment of the $8,000 debt in the Farmer's National Bank for collection, also referred to by counsel, was provided for out of the Beverstock loan obtained on the 26th of September, before the failure of Hickox and the bank was announced.

The fact that creditors did not commence proceedings in bankruptcy *immediately*, and that the claim of the petitioning creditor was not then due, argues nothing against the fraudulent intentions and illegal preferences of Mr. Colby.

Counsel insists that Colby only knew of $5,000 or $6,000 of the Hickox paper at the date of these mortgages.

Colby testifies (pp. 102-103) that he knew of $30,000 at that time.

It is urged by counsel (p. 12, arg't for appellants) that Mr. Colby, in making the mortgages to Mrs. Barbour in the midst of the most exciting panic that ever overwhelmed that community, was, under the circumstances, doing what "it became every man owing money" to do, "to see that his affairs were so arranged as to require the least amount of ready money possible to meet his obligations. To allay demands for immediate payment of money from any source that might arise was one of the important things to do, and thereby obtain time to convert property into money, and otherwise to procure ready means to meet such claims as might be demanded."

Did Mr. Colby suppose that putting such an incumbrance on the public records at such a time, upon substantially all of his realty, already encumbered, to his near relative, for such an amount, would allay demands from his many unsecured creditors? or that he was thereby facilitating his raising money? or that it would induce his other creditors to slumber upon the immense volume of his indebtedness, daily maturing?

The case is submitted by the appellee with confidence that the decree of the Circuit Court was right, and should be affirmed.

NORRIS N. LEYMAN, (of
DIRLAM & LEYMAN,)
Solicitor for Apellee.

Supreme Court of the United States.

NO. 250.

MELISSA A. BARBOUR ET AL.

vs.

STEPHEN B. PRIEST, ASSIGNEE OF HUBBARD COLBY, A BANKRUPT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

ARGUMENT FOR APPELLANTS,

BY A. K. DUNN,

IN REPLY TO ARGUMENT FOR APPELLEES.

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Counsel for appelle has, in his argument, selected detatched and disconnected portions of the language used by the witnesses, transposed sentences, and rearranged them so as to appear to be a consecutive statement of the witnesses and marked the same with quotation marks, thereby conveying to the reader the idea that the evidence thus made up is the evidence of the witness as given him consecutively and in the order set forth in his argument, while in the printed Record the contrary appears, wherefore it is necessary that the true character of the evidence quoted therein of "reasonable cause to believe" be brought to the attention of the Court.

I will take up the witnesses so quoted *seriatim*, and call attention to

that portion of the testimony of each which contradicts, explains, or modifies the character of the evidence as set forth by counsel for appellant.

In the testimony of A. C. Cummins, after making the quotation thus: (p. 21) he omits the testimony between that and his next paragraph, which is as follows:

"Ques. Was it not generally said immediately after the failure of the First National Bank and Mr. Hickox was reported, that Colby was broken up? (Objected to by solicitor for defendant.)

"Ans. I cannot say that it was, until the amount of his indebtedness was generally known.

Ques. State whether or not the fact of his being indebted to the Farmers' Bank, to Allen Beverstock and others, was not talked over generally shortly after the failure of the First Nat. Bank and Hickox. (Objected to by solicitor for defendant.)

Ans. The first I knew of his indebtedness to Allen Beverstock was in seeing the mortgages on record at the Recorder's office, or perhaps I was told by the Recorder the day it was left for record, and I think after that time it was generally talked over.

Ques. Was there not considerable talk generally after failure of 1st Nat. B'k and Hickox, on the day subsequent to the failure and on the days thereafter, and was not its effect on Mr. Colby generally spoken of in connection with the failure? (Objected to by solicitor for defendant.)

Ans. There was considerable talk and excitement for days after the failure, and Mr. Colby's name was mentioned in connection with it when it became generally reported that he was on a large amount of Mr. Hickox's paper." (Printed Record, pp. 21, 22.)

Eccles McCoy (p. 31), in answer to a question as to time of reports, says: "I cannot answer that question better than I did before as to date. It was since that occurrence.

Ques. Was it a month after the occurrence?

Ans. I could not say whether it was immediately or a month. I have no doubt but that it was all along in those times."

Byram B. McVey was called into the First National Bank in a confidential relation, and in that relation was consulting with those interested in the bank. The meetings he attended were private, and the information he got confidential and was not to be, and was not, made public. He says (p. 34), when relating an interview he had with Colby on Tuesday evening: "I did not feel as though I was at liberty then to

enter into the detail of things, and that he knew as much about it as I did. * * * I gave Mr. Rowland, confidentially, the information I had received from the bank as to Mr. Colby's appearing on the paper found, as I have before stated. * * * Mr. Rowland was County Treasurer and Mr. Shellenberger was his clerk."

As to the meetings the witness had been testifying about, he said: "They were meetings of the officers simply, and I was called in and requested to act as cashier at the time, and was elected as such by the officers temporarily; they were rather private meetings, except as to interruptions by persons calling there inquiring about their business in the bank. * * * The information attained was never made public by publication, that I remember of. * * * I don't remember of any agreement of that kind, but think was considered it would be best to keep it as close as possible and not make it public on the streets in conversation. * * * It was communicated to persons in confidence." Rowland and Shellenberger were in the office of the county treasurer. Thomas E. Douglass, who testifies in the case further along, was their brother-in-law, and the information of each was derived from the confidential relation of McVey as cashier, and made known to them in confidence only for themselves, and not to be made public.

Wm. Bushnell is quoted as saying reports commenced at the time of the failure, and the words are italicised in the Argument, page 21; but the Record has it, (p. 36): "I *think* the talk commenced at the time of the failure." He does not speak positively as represented. In speaking of the meeting at Miller's Hall, he says: "The subject matter and consideration was to pass some resolution requesting the depositors in the banks of Mansfield not to make a rush upon the banks to draw out their money, as there was great excitement and it was feared that there would be a run upon the other banks of Mansfield, as one had already failed; and among other things that came up, there was a request that the banks pay a small per cent. to their depositors." He also says, on same page of Record: "It was pretty generally talked over, and also before that meeting was called. It was the general subject of conversation among the citizens on that day that it would affect Mr. Colby and *his bank*. On cross-examination he is asked (p. 37); "The idea was, was it, that if a run was made on the Farmers' Nat. Bank, and it failed, he and others would fail with it? Ans. That was the substance of it."

Columbus Doolittle is quoted, on page 22 of Argument, as saying that Colby "was heavily involved with Mr. Hickox and the Farmers'

National Bank." The Record (p. 38) has it, the "1st Nat. Bank," instead of the Farmers' National Bank. There is no evidence in the whole case that Colby owed the First National Bank anything at the time of its failure, which shows that the witness was mistaken. The Argument quotes the witness as testifying positively of the date of the reports of which he speaks, that "it was quite soon after the failure," and puts it in italics. While the Record says: "I talked with a number of citizens myself on that subject. I cannot tell the day, or the exact time after the failure, but it was quite soon, *I think*."

On cross-examination he was asked and answered as follows: "Was the talk you heard in regard to the effect of the failure on Colby based on his being involved as bail with for Hickox? Ans. That was one of the chief items, but ever after that, other things, such as his connection with the railroad, and his being a borrower of the bank, was talked of.

Ques. Of what bank was it said that he was a borrower?

Ans. Of the First Nat. Bank, and also of the Farmers' Nat. Bank. This was the first that the public knew he was so large a borrower."

There being no evidence in the case of any indebtedness of Colby to the First National Bank at the time of its failure shows that Mr. Doolittle must have got confused in the reports he had heard, as well as to the time of them, or that the facts did not warrant the reports he heard.

Hiram P. Smith, in answer to the very next question after his answer quoted by counsel for appellee, said (p. 40): "I heard nothing that was positive. The talk I cannot repeat. It was supposition, as far as I heard. I did not hear a great deal of talk about it. There were several talked to me about it. It was a matter of *suspicion*, you might say." This witness expresses the exact state of the mind of the community as regarded the condition of the affairs of Colby when he says: "it was a matter of *suspicion*," which is what it was and nothing more, until, in the course of time, long after October 1st,—the date of the mortgages,—it ripened into a belief founded on the discovery of his liability for Hickox, and then proceedings in bankruptcy were commenced. Mr. Hiram P. Smith, the witness, was a stockholder in the Farmers' National Bank, and so was Colby. They were both elected directors of that bank —elected the last time in January, 1873, and in answer to the question how long Colby continued to act as director, he says (p. 41): "I am not positive as to the time. It was after he was known to be liable in the Hickox cases." In the testimony of L. A. Armentrout (p. 28), he

says, in answer to the question, "Did he (Colby) continue a member of the board until November or December, 1877? Ans. He did."

Thomas E. Douglass is quoted as fixing the time of hearing the reports as to Colby on the next day after the failure, when the language of the Record (p. 42) is: "*I think* it was the next day and at different times afterwards, by several parties." On the cross-examination the following question and answer appears (p. 42): "Was the fact that Colby was largely on the paper of Hickox said to be the reason why he would be affected by the failure? Ans. "That was said to be the reason. I do not recollect of any other reason." On the same page and the following, he says his talks were with Shellenberger, and Rowland, and H. P. Davis. Rowland was his brother-in-law, Shellenberger, Rowland's clerk in the Treasurer's office, and he says as to the matter connected with the treasury: "Whatever Rowland said to me, he said it to me in the capacity of an attorney." His communications, therefore, from Rowland and Shellenberger and, as we have seen before, from McVey to Rowland, were private and confidential, and he does not, on cross-examination, claim that the conversations narrated by him took place before the first day of October, but said (p. 44): "I cannot state positively, but, as I said before, I give it as my best recollection that these conversations, or their substance, took place within a week." As to conversation with Davis, this occurs (p. 45): "Can you state how long after the failure it was until you had the first conversation with Davis about his being on the bond of Mr. Colby?

Ans. It may have been a week. I do not think it was so long; but it may have been longer."

Mr. Davis says, in his examination (p. 131), that he did not hear such reports until about one week after failure of bank. He says, "and the first I heard of this matter as a rumor or report was about one week after the failure of the 1st National Bank.

9th Ques. What was the financial reports taken of Hubbard Colby in Mansfield, upon and up to the time of the reports which occurred after the failure of the said bank, or being solvent or insolvent? Ans. His reputation up to that time was that he was solvent.

10th Ques. Did you have a conversation with Thos. E. Douglass within a week after the failure of the 1st National Bank of Mansfield, O., in which you spoke of the possible or probable failure of Mr. Colby, saying you was on his bond as executor and administrator?

Ans. I did not within that time."

L. J. Tracy is cited and made to give color to Colby's insolvency, but when inquired of more particularly, says (p. 45): "I don't remember that it was brought up in regard to his solvency or insolvency." He does not state any time when he first heard the reports he mentions.

Patrick Ford is next cited as placing the reports within two days after the failure. What Ford does say is this (p. 52): "It was talked within two days, I should *think*, after breaking of bank." On cross-examination he is asked in regard to the time he conversed with Mrs. Barbour, whether before or after he had heard reports as to Colby, and he answers (p. 53): "It was after. How long after? I cannot say definitely. Was it ten days afterwards? I should think it was."

On re-examination he is asked (p. 54): "State now whether or not you have any reason to change your answer-in-chief, wherein you say that these conversations commenced about the forepart of the week following the failure?

Ans. The conversation in regard to Mr. Colby did not commence the fore part of the week following the failures; I think it was the conversation in regard to Mr. Hickox."

John B. Netschee is quoted as to time. He says (p. 55): "I *think* it was talked of during the week following the failure. I cannot say what time in the week."

James Dickson is quoted in italics as saying: "the next morning after the failure" he heard report concerning Colby. The Record does not state his evidence so, but entirely otherwise. The Record says (p. 56): "The next *Monday* after the failure I was on the street and heard that Colby was on paper, and that it was likely to affect him."

On cross-examination was the following questions and answers (p. 56): "In the reports that you have stated that you heard, was it said that the cause of the failure affecting Colby was that he was an indorser on Hickox's paper?

Ans. The general report that I heard appeared to be that he was on his paper.

Ques. Was that the reason assigned why he would be affected financially?

Ans. That was the talk. * * *

Ques. May you not be mistaken as to having heard that amount stated on Monday following the failure?

Ans. My best impression is that I am not. * * *

Ques. Did you hear these matters talked on any other day than that you have mentioned?

Ans. I think I have heard them spoken of.

Ques. When?

Ans. I cannot recollect the dates.

Ques. Can you recollect any of the dates?

Ans. I cannot."

E. W. Smith is quoted as to reports the first week after the failure. If so, it would not follow that the reports were made before the mortgages, as the first day of October would be on Wednesday of the week after the failure.

Dr. Wm. Loughridge is cited to same end, but he fixes no time. He says (p. 56): "I do not recollect the exact time as to whether it was immediately or for some time after. * * * (p. 60.) It was some time after, shortly after the failure of Hickox, probably within two weeks.

Ques. Can you state how frequently you heard the talk above stated, and whether on the streets or elsewhere?

Ans. But once that I recollect distinctly; it was on the street."

Thomas J. Rolinson is cited as to time of reports. He is on the Record thus: "I think it was generally talked that Colby would lose pretty heavily by the failure of Hickox; I have heard that kind of talk.

Ques. Supposing the failure to have occurred on Friday, Sept. 26th, 1873, how soon thereafter do you say you heard these reports?

Ans. I could not give the definite time.

Ques. State about what time you heard them.

Ans. It might have been within two weeks, and it might have been later. * * *

I recollect of a conversation I had with Mrs Simmons coming home from prayer-meeting, on the subject of the failure of the bank and public rumors of Mr. Colby's losses."

Z. T. Stocking is quoted to sustain reports at an early date. He is asked what time on Friday he left Mansfield (Friday was the day of the bank failure), and he answers (p. 62): "I presume on the first train to Crestline, as I usually took that train.

Ques. What time a day was that?

Ans. I think it leaves about 9 o'clock a. m."

The failure of the bank took place in the afternoon, so that Mr. Stocking is evidently referring to talks he heard after that time. His memory serves him badly as to what he did hear, as he says (p. 62): "I

can remember no special conversation or statement of any single person on the subject, but remember only general impressions."

Counsel for appellee has omitted the next three witnesses—Emeline Clapp, Perkins Biglow and Wm. Bird—who do not sustain time, and passes to the next.

Henry Sturges is cited as fixing time of reports. He is asked (printed Record, p. 67): "1st ques. Was the fact that Colby was indorser for Hickox the foundation of the reports that he would be affected financially by the failure referred to in your examination in chief?

Ans. Yes, sir."

After stating the liability of Colby and others on the railroad paper, he says (p. 69): "I have made this statement: that I did not think that the signers of these notes would lose anything; if they did, it would be very little."

Walter S. Bradford is cited on the same question. In answer to a question in chief as to the time of the reports mentioned, he says (p. 72): "I should *think* within two or three days; I do not know but sooner," and on cross-examination: "I am not positive; it was either Saturday, Sunday or Monday. As I said before, I cannot be positive as to the time."

John Harvey is cited as to conversation with Colby as fixing the time positively, but he says (p. 79): "I think it was on the following week; early in the week. * * * There were reports all over town that the failure of Hickox would affect Colby, *on account of their being connected with the Coldwater Railroad.*"

Chas. A. Demaeyer is cited to the same point, and he gave the basis of the reports in answer to the following question (p. 76): "Ques. Was the reason why Colby would be affected financially by the failure said to be the fact that he was largely on the paper of Hickox?

Ans. I think that was the principal reason."

Harvey Hall is quoted as fixing the time positively on the Monday following the failure. But Mr. Hall says (p. 77): "I *think* I was here on Monday following," as to reports, he says: "I *think* there was. * * * I think I did not hear them on the street, as I was on the street but very little that day; I cannot say how general they were."

Alexander Morrow is quoted, or rather misquoted, most singularly to support the same position claimed by the counsel for appellee. In reply to a question about the time of the failure of the bank and Hickox he is on the Record thus (p. 78):

"Ans. There were such reports, but as to whether it was before or

after the said failure I cannot say; it was about that time; I think it was before.

Ques. What was the character of these reports?

Ans. They were that if Mr. Colby failed it would involve Mr. Davis.

Ques. Were there any reports as to the financial condition of Colby after Hickox and the First Nat. Bank had failed?

Ans. Yes, sir.

Ques. What were these reports?

Ans. That he would not be able to meet his liabilities, and that it would involve others.

Ques. Supposing the failure to have occurred on Friday, 26th of September, 1873, how soon thereafter would you say you heard these reports?

Ans. My recollection as to that is not very distinct, as there were rumors both before and after the failure as to the consequences of his failure. I cannot recollect any distinct or particular conversation after the failure. The most distinct recollection I have of any talk was before the failure, as to the consequences if he did fail.

Ques. What failure do you have reference to?

Ans. Mr. Colby's."

In reference to the time of the failure of the bank and Hickox, he says: I could not state exactly how long it was after that failure; it may have been ten days or two weeks, or it might have been three weeks after the failure."

It must be remembered that the testimony of the foregoing witnesses was taken more than a year after the "rumors," as the last witness, Morrow, characterizes them, were put afloat in the community, and, when so remembered, the want of accuracy and reliability in the repetition of them must be obvious.

The same singular method of quoting the evidence of appellants in reply has been pursued by counsel for appellee as that adopted in citing the evidence in behalf of appellee, which renders it necessary to call attention to the evidence as actually given.

The witnesses called in reply were each asked three questions: (1) As to residence, business, location and time so located; (2) as to acquaintance with Colby and time thereof; (3) as to failure, rumors, and when first heard. The answers of each showed him to have resided a number of years in Mansfield, engaged in public business in the most public part of the place; to have been acquainted with Colby and the

citizens generally, and to have had the means and opportunity of hearing and knowing what was said and done in the business part of the place. The answers of each witness to the 3rd interrogatory I will quote, that it may be seen how it corresponds with the statement of it by counsel for appellee.

A. Scattergood says (p. 117): "I remember the occurrence of the failure of said bank; I do not remember of Colby's name being mentioned immediately after the failure as being involved. My recollection of dates is somewhat imperfect, but I am able to refresh my memory from outside matters; for instance, a visit I made to Canton at a convention, as late as the 22d of October, 1873. At that point a number of friends I met had a good many inquiries to make of persons and affairs here. I remember my reply to Mr. Colby's was that so far as Mr. Colby's affairs were concerned it was hopeful he would go through. I find that in keeping a daily record of events that on Oct. 27th, 1873, there was considerable talk with reference to Colby as involved with Hickox."

George W. Blymyer (printed Record, page 129) says: "I do remember of said occurrence. It is pretty hard to separate rumors I heard from conclusions I jumped at from my knowledge of the intimacy of Colby and Hickox, and that their business was so connected that if one went the other would have to go, but I should think it was over a week after that before I heard any rumors. The rumors were that Colby and Hickox were on each other's paper for a large amount."

Wm. B. Mercer (p 122) says: "I remember said occurrence. I cannot say definitely as to time when I heard reports as to Colby. Heard reports and heard rumors, but cannot say definitely as to time. The reports were that Mr. Colby was involved with Hickox, and would lead, probably, to his failure. It was several days, probably a week. There was so much excitement I cannot fix definitely the date."

Wm. H. Harris (p. 124) says: I do remember said occurrence. I recollect of hearing soon after the failure of the National Bank of reports affecting Colby, but I do not recollect how soon thereafter, but think it was about a week or ten days thereafter. The first I heard was that Colby had indorsed for Hickox enough to affect him some, but did not hear what amount; after hearing that, but how soon after I cannot say, I heard that his losses by Hickox would be the cause of his failure, and afterwards heard other rumors."

C. Shumway (p. 125) says: "I remember that occurrence. Did hear reports unfavorable to the condition, financially, of Hubbard Colby,

but hardly can tell when I first heard them; as near as I can recollect, it was two or three weeks after the failure of the 1st National Bank."

Jno. Wood (p. 127) says: "I remember said occurrence. Did hear reports about Mansfield unfavorable to the financial condition of Hubbard Colby, after the failure of said bank. I should say from 10 days to 2 weeks after the failure of the bank."

Hiram Harroun (p. 128) says: "I remember the occurrence; I heard no reports at that time unfavorable to Mr. Colby's financial condition; I did, a week or more after the failure of the bank, hear reports."

Jos. H. Black (p. 129) says: "I do remember the said occurrence of the failure of the 1st National Bank. I heard some reports unfavorable to Colby's financial condition, but not immediately after said failure, nor for ten days or two weeks after the said failure."

Counsel for appellee, in speaking of the testimony of Mrs. Barbour, on page 30 of his Argument, strangely says: "Yet she nowhere directly denies having heard the general information which surrounded and was reported to her before she knew of the mortgages." While the Record (page 80) contains the following: "15th ques. State whether or not you had heard any reports on Oct. 1st, 1873, or prior to that time, unfavorable to financial condition of Hubbard Colby. * * *

Ans. I had not.

16th ques. What was your estimate of the value of Hubbard Colby's property, or what he was worth on Oct. 1873, and for some time prior to that time?

Ans. $250,000 or $300,000.

17th ques. How long after Oct. 1st, 1873, did you hear reports unfavorable to his financial condition? When did you first hear after Oct. 1st, 1873?

Ans. Several weeks."

In making such a declaration counsel went out of the Record and drew on his imagination for his facts, as he did in his statement, on page 26 of his Argument, that it was impossible "to even get a breath of fresh air without coming in contact with" rumors of Colby's condition.

As to Values.

It is claimed, in argument, that "in a moment, in the twinkling of an eye"—the small space of time, less than five days between Sept. 26th and Oct. 1st, 1873—property in Mansfield had depreciated (there is no evidence of any depreciation before that time,) nearly half its previous value. An example or two will illustrate the inexactness of this position

Consider the evidence on the value of the property designated some times as the Geddes Block and at others as the Colby & Geddes Block, of the undivided one-half of which Colby was the owner.

Joseph H. Black (page 129 of Record) was asked and answered as follows:

"2d ques. Do you know how much the Colby & Geddes building rents for: if so, please state the amount?

Ans. It rents for $3,750.00, or about that."

At 10 per cent. rent on the value of the property it would be worth $37,500, at 8 per cent., $46,870, at 6 per cent., $62,500.

Stephen B. Sturges, who was the assignee of Colby at the time his testimony was taken, says (p. 147): "The net rent of the property, after paying taxes and ordinary repairs, is about $2,600 per annum, * * * and I suppose it pays about 8 per cent. on $30,000, allowing a reasonable charge for leasing and collecting rents."

The reasonable charges, according to Mr. Sturges, would be $1,150, nearly one-third of the entire rent, and would be as liberal as the charges for his services mentioned in his testimony in regard to the Mansfield Machine Works, the value of whose stock he estimated at 30 per cent., and to which I desire to call attention. The stock of this company had, before and up to and after October 1st, 1873, sold at par with a single exception of a sale made under peculiar circumstances and more than a year prior to the failure, when the stock was considered worth par by all. Reese sold $10,000 of stock at par, the Monroeville Bank, $5,000 at par, and the Richland National Bank purchased $15,000 of the stock at par. Mr. Reese sold $5,000 under par under the influence to which he was subject. Colby says (p. 90): "One day, when he was feeling pretty blue, he said if I would give him $1,000.00 I might have $5,000 of the stock; I took him up, and he transferred it." A. L. Grimes, the secretary of the company, in regard to Mr. Reese, says (p. 14): "He was superintendent; impulsive, changeable, foreboding evil often, talking of disasters in anticipation, as I thought often for talk sake. He sold his stock off at a number of different times during a series of years." This testimony explains the sale of Reese's $5,000 of stock to Colby at less than par, but no other instance of the kind occurred prior to Oct. 1st, 1873, and Mr. Grimes puts the stock at 75 per cent. to 100 per cent.

After the failure of the First National Bank, the Mansfield Machine Works, in November, 1873, made an assignment for the benefit of its creditors to Mr. Sturges, who testified on the 13th day of March, 1875,

and when inquired of as to the value of the stock, said (p. 147): "It is difficult to separate my former opinions as to the value of the stock and those I formed from information I obtained afterwards; but, according to the best of my ability, judging from all I knew of it before, and what I had heard of sales of the stock between the officers of the company, and from my knowledge of what additions had been made to the capital without money to represent it, I do not think I could have been induced to have paid 30 per cent. for it. * * *

10th ques. During the ninety days the property was in your hands as assignee, were the works running or standing still?

Ans. I took the responsibility, as I understood outside of the law, to complete a few unfinished jobs or machines, and the works were running for that purpose, and none other, a short time, and some hands.

11th ques. What was the amount of the expenses attending on that assignment?

Ans. I cannot give the information; it is at the office of the Probate Judge.

12th ques. What was the amount of your services as assignee?

Ans. I charged such as I was advised in view of the amount involved, the responsibility incurred, and the services rendered, I was justified in making $3,000,00."

After going through hands of Mr. Sturges and suffering a depletion at his hands, the stockholders received the property back and put the works again in operation. The condition of the company in Oct. 1873, is set forth in the testimony of N. Abbott, called by appellee, who says (p. 134): "The assignment was made in November—Nov. 4th, 1873—but the matter was talked of during the month of October, 1873. It was talked of from right after the failure of the First National Bank, from about that time. The statement made to the creditors showed $351,000 of assets and $171,000 of liabilities, but not including the stock."

This statement was made about the middle of the month of October, 1873, and the works had continued in operation up to the last meeting of the directors, Oct. 20th, 1873, which took into consideration the financial condition of the company, just as they had done before, no one outside of the board of directors had been informed of the condition of the company, and there was no question in the community as to the value of the stock, or depreciation of it prior to that meeting (p. 135). And Mr. Abbott states, in answer to the following questions (p. 131):

"No. 8 ques. Is the Machine Works in operation now, and has the

corporation got back their property which was assigned to the assignee, made an arrangement with their creditors, and are carrying on their business as heretofore?

Ans. Yes, sir.

9th ques. Was there any disposition or sale of any of the property under the assignment, or was it transferred back just as the assignee received it?

Ans. With the exception of the engines and a saw-mill, it was. These had been contracted before the assignment, and were delivered in pursuance of contract by assignee."

Farmers' National Bank stock is estimated by all at par before and for some time after Oct. 1st, 1873.

James Purdy, the president of the bank and witness for appellee, was examined and answered, on cross-examination, as follows (p. 141):

2d ques. What did you regard the stock of the Farmers' National Bank worth before Oct. 1st, 1873?

Ans. Thought it was good—the face of it; knew nothing about the interior of it.

3d ques. What was the market value of the stock on Oct. 1st, 1873, and prior thereto?

Ans. I do not know as it had any market value. There was no buying or selling.

4th ques. What was its standing in the market?

Ans. So far as I know it was good. Had no doubt of it myself. * * *

10th ques. How long were you president of this bank, and are you still its president?

Ans. I was president from its organization—a sort of ornamental head. I am not. Con'd until the beginning of this year."

The stock of the Gas Light Company counsel puts down at 40 per cent., while the testimony shows that it was worth at least 75 per cent., and could not be bought at less than par until depreciated after October 1st, 187. The same witness, James Purdy, and an interested party and enemy as shown by his testimony, is inquired of and answers, on cross-examination, as follows (pp. 141, 142):

"12th ques. What was the value of the stock of the Mansfield Gas Light Co. on and before Oct. 1st, 1873?

Ans. I do not know as it had a market value.

13th ques. What was it worth on Oct. 1st, 1873, and for a year prior to that time?

Ans. Do not know. We trusted it all to Mr. Colby. He made a dividend of 2½ per c't. every quarter for a number of years — for several years. Only can say that when I come to investigate it was not worth more than 40 per cent. The works were worn out.

14th ques. What is the stock worth now?

Ans. I have heard of persons selling for 64 cts. on the dollar, and have heard of persons selling, for some held as collateral, at 75 cts. on the dollar. It is not worth over 40 cts. on the dollar.

15th ques. How much have you been offered for your stock?

Ans. There was a man here some time ago wanted to buy a controlling interest in the concern, and I think he offered 60 per cent. to 75 per cent., and I have forgotten which. I declined selling, for I did not want a foreigner to come here and control the works. At that time I did not know that rebuilding would be necessary. We have since come to the conclusion we will have to rebuild entirely.

16th ques. Have you not been offered 75 per cent. for it?

Ans. I have no recollection of any offer except the conversation with this man, or some member of the board, with reference to this offer. The company were divided in opinion as to what had best be done. I was opposed to selling; don't recollect the amount of the offer; either 60 cts. or 75 cts.; and if we took it we must make repairs not to exceed a certain number of dollars. Mr. Strong was anxious to have him control the works, and I was not.

17th ques. Are you willing to take 75 cts. now?

Ans. I do not know as I would. I could have taken over par for my bank stock before it burst, but I would not. If a man will offer 75 cts. I will answer.

18th ques. What has appreciated the stock since Oct. 1st, 1873?

Ans. Don't no as anything has."

The foregoing instances are sufficient to show the want of accuracy in the results drawn from the testimony as quoted and commented upon by counsel for appellee, and that the exaggeration of values applies to the depreciation by counsel rather than the enhancement in the statements of Colby.

In the estimate of counsel he depreciates the property of Colby on an average more than one-half. He sets down the stock of the Mansfield Machine Works at $17,500, which is 25 per cent. on $70,000, which the

evidence shows was, up to Oct. 1st, 1873, worth 75 per cent. to 100 per cent., and is shown to have assets by the invoice taken at the date of the assignment to S. B. Sturges, Nov. 4th, 1873, or a few days prior thereto, amounting to $180,000 above its liabilities except stock of $300,000, and which would pay on the stock 60 per cent.

S. B. Sturges (p. 147) puts the net rent of the Geddes & Colby Block over and above taxes and repairs at $2,600, making an income net on $45,000 at nearly 6 per cent., which is more than can be realized out of most loans or investments. The sale of one-half of this block would, at this rate, be $22,500, but counsel sets it down in "the aggregate of this liberal valuation" at $15,000, or 33 per cent. less than the income would make it, and this income is realized a year and a half after the panic.

The stock of the Farmers' National Bank he puts down at $5,250, or 50 per cent., while the evidence of its president puts it, Oct. 1st, 1873, at par or over. In all the estimates of values he has pursued the same course, and thereby made an aggregate of $114,855, being less than 40 per cent. of the value to be fairly deduced from the evidence.

The real estate known as the "Bell farm" of 130 acres is put down at $15,080, although the witnesses, John B. Daily (p. 137) and E. W. Smith (p. 130), without qualification, put it value at $150 per acre, and even S. B. Sturges admits (p. 146) the value might reach $150, making instead of $15,080 the value of $19,500, and Daily says it was worth 20 per cent. more before the failure.

Ordinary Course of Business.

The closing paragraph of original Section 35, cited by counsel for appellee in regard to the presumption arising when the transaction is out of the usual and ordinary course of business of the debtor, has no application to the facts established by the evidence in this case. An examination of the cases cited on this subject by counsel in connection with the following cases will show that they do not sustain the position, viz.: *Judson v. Kelley*, 6 B. R., 165; s. c., 5 Bt., 348; *Tiffany v. Lucas*, 5 B. R., 437; s. c., 8 B. R., 49; s. c., 1 Dillon, 164; s. c., 15 Wall., 410; *Sedgwick v. Wormser*, 7 B. R, 186; *In re* The Union Pacific R. R. Co., 10 N. B. R., 178.

"Cases may occur involving all the elements of fraud so far as the vendor is concerned, and yet be valid by the palpable presence of good faith in the vendee." *In re* Hunt, 2 B. R., 539; s. c., C. L., N., 159.

Agency.

In the Argument of counsel for appellee, on page 41, he says: "In

thus confiding her business to him and subsequently ratifying his acts for her benefit, she made him her agent, and his knowledge of his own condition and intentions became her knowledge."

The legal principles applicable to agency does not apply to the facts in this case. Colby could not be an agent for Mrs. Barbour to transact business with himself for her. Agents are those who transact business for one person with a third party and not with themselves. The case is too plain for argument. The mere statement of the proposition is its refutation.

TRANSACTION WITH JONES.

In answer to the statement made in Argument for appellants of Colby's transactions with Jones, to sustain the claim that he continued to transact his business after making the mortgages to Mrs. Barbour, counsel for appellee, on page 49 of his Argument, says it "was but one of his acts of preference which has since been annulled at the suit of the assignee." The statement of counsel is wholly unwarranted, by any evidence in the case, and, so far as is known to counsel for appellants, by any fact outside of the record.

A. K. DUNN.
Counsel for Appellants.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 275.

JOSEPH GOLDING, MASTER, &c., OF THE SCHOONER ELLEN HOLGATE, APPELLANT,

vs.

THE STEAMSHIP ILLINOIS, JOHN W. SHACKFORD, MASTER, THE AMERICAN STEAMSHIP COMPANY, CLAIMANT.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 15, 1878.

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a In the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit. No. 2. April session, 1877.

JOSEPH GOLDING, MASTER AND PART OWNER of the schooner Ellen Holgate, and Edward Nelson Sapp, steward on board said schooner,
vs.
THE STEAMSHIP ILLINOIS, WHEREOF JOHN W. Shackford is master.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania in the third circuit, of April session, 1877. No. 2.

b Inter alia it is thus contained:

Be it remembered that on the 14th day of March, A. D. 1877, the proctors for the respective parties come into our said court here and filed the record of the district court of the United States for the eastern district of Pennsylvania, which being read is as follows, to wit:

In the circuit court of the United States for the eastern district of Pennsylvania. In admiralty, No. 2. April session, 1877.

Appeal from the district court of the United States for the eastern district of Pennsylvania. In admiralty. Collision.

J. Warren Coulston, esq., proctor for libellant.
Morton P. Henry, esq., proctor for respondent.

1 In the district court of the United States for the eastern district of Pennsylvania. In admiralty.

JOSEPH GOLDING, MASTER AND PART OWNER of the schooner Ellen Holgate,
vs.
THE STEAMSHIP ILLINOIS, WHEREOF J. W. Shackford is master.
No. 13 of 1875.

Pleas before the honorable the judge of the district court of the United States in and for the eastern district of Pennsylvania. It is thus contained:

Be it remembered that on the 19th day of March, A. D. 1875, J. Warren Coulston, one of the proctors of said court, comes into the said court and exhibits the libel and complaint of Joseph Golding, master and part owner of the schooner Ellen Holgate, against the steamship Illinois, whereof J. W. Shackford is master, in a cause of collision, civil and maritime, which being read and filed, is in the words and figures following, to wit:

2 To the honorable John Cadwalader, judge of the district court of the United States for the eastern district of Pennsylvania.

The libel of Joseph Golding, master and part owner of the schooner

Ellen Holgate, of Philadelphia, her tackle, apparel, and furniture, of the burthen of 168 registered tons, on his own behalf and on behalf of the other owners hereinafter named, against the steamship Illinois, whereof Captain Shackford is master, her tackle, apparel, boilers, machinery, and furniture, and against all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime, alleges as follows:

First. That the schooner Ellen Holgate, at the time of the collision hereinafter mentioned was tight, staunch, and strong and well and sufficiently manned and equipped for the coasting trade, in which she is engaged, and is owned by Joseph Golding, the said master, 1-16th; Scull and Rex, 4-16ths; Norcross and Sheets, 2-16ths; Thoms R. Fort, 1-16th; estate of James Wallace, deceased, 1-16th; George Krick, 1-16th; estate of James McDougal, deceased, 1-16th; Wilson Fitzgerald, 1-16th; J. Galbraith & Co., 1-16th; John S. Lee & Co., 1-16th; all of Philadelphia and Camden, and Samuel Thorp & Co., 2-16ths, of New York.

Second. That on the third day of March, A. D. 1875, at about ten o'clock a. m., the said schooner Ellen Holgate, without cargo, and having her mainsail and foresail and two jibs set, and with the libellant at her wheel, was under way in the Delaware Bay, off Reedy Island, with the wind about northeast, beating up the bay with the first of the ebb tide, bound for the port of New Castle, Delaware, heading a course about east-southeast on a back tack, the wind blowing a fresh, stiff breeze, with hail and rain, when the steamship Illinois, under way bound for the port of Philadelphia, and heading under good headway a
3 course about north-northeast, came up with the said schooner and ran into and afoul of the said schooner, striking her on the starboard side on her main chains, driving the bow of the steamer into the said schooner about seven feet, and cutting her down to the floor heads, thereby causing her to fill with water and capsize in about fifteen minutes thereafter.

Third. That said collision was caused solely by the negligence and carelessness of the said steamer, and those having charge of her:

1. In attempting to cross the bow of said schooner.

2. In not passing the schooner under her stern, there being plenty of room so to do.

3. In not taking in time a course necessary to avoid the schooner.

4. When the said steamer found that she was in close proximity to the said schooner in not slowing down and stopping in time to avoid said collision.

Fourth. That said collision was in no wise caused by negligence or carelessness on the part of the said schooner or those navigating her. About eight or ten minutes before the collision the said schooner Ellen Holgate was standing on a course about north-by-west, and when in about mid-bay the libellant, who was at the wheel, in order to avoid a large field of ice ahead and off the schooner's port bow, put the said schooner in stays to go about. The schooner, which works slowly, after some delay did go about on her back tack, and headed about east-southeast. As soon as the schooner got about the libellant discovered, he being still at the wheel, the steamer Illinois about two hundred yards off, and under good headway, steering a course about north-northeast, which course was taking the steamer across the schooner's bow. The libellant held the schooner to her course by the wind, which was about east-southeast, as he was bound to do, and did nothing in the
4 navigation of his vessel to embarrass or prevent the said steamer Illinois from avoiding the schooner. When the schooner's wheel

was hove down by the libellant to go in stays, the steamer Illinois was at least a half mile below the schooner.

Fifth. That after the said collision the said schooner capsized as aforesaid, and her anchor and chains dropped out of her, the said anchor catching on the bottom. The ice was heavy in the bay, and it was important and necessary in order to save a total loss of the said schooner that she should be towed into a place of safety. The tugs Young America and Col. S. L. Brown being in the vicinity at the time of the collision, were engaged by the libellant to tow the said vessel into a place of safety, and said tugs did tow the said schooner, in her capsized condition, to Reedy Island piers; from thence she was towed to Delaware City, and thence to New Castle, where divers were employed who patched her up so that she could be towed to Wilmington, Delaware, for repairs, to which last place she was subsequently towed, and where she now lies.

Sixth. That by reason of the said collision the libellant and owners of the said vessel have suffered great loss and damage, as follows: The cost of repairs occasioned by said collision will amount to about four thousand five hundred dollars; that it will take about forty-six days from the time of the collision to fully repair the said vessel at a loss for detention of about twelve hundred dollars. The towage claims in consequence of said collision will amount to two thousand dollars, and the cost of divers an additional sum of one hundred and fifty dollars. At the time of said collision the libellant was bound to New Castle, Delaware, for a cargo of grain to carry to Providence, Rhode Island. This charter has been lost in consequence of the said collision, to the damage of the libellant and owners of said schooner six hundred dollars, making a total damage to the libellants of about eight thousand four hundred and fifty dollars, which said sum the libellant claims to recover in this cause, together with interest.

Seventh. That in addition to the said damage mentioned in the sixth article, the libellant, as master of said vessel, has suffered a loss of nautical instruments and other personal property of the value of six hundred dollars, which he also claims to recover, with interest, in this cause.

Eighth. That said steamer is now within the jurisdiction of this honorable court.

Ninth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellant prays that process in due form of law, according to the course of this court in cases of admiralty and maritime jurisdiction, may issue against the said steamship Illinois, her engines, boilers, and machinery, tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court would be pleased to decree the payment of the damages as aforesaid, with interest and costs, and that the vessel may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

JOSEPH GOLDING.

Sworn and subscribed to before me this 19th day of March, A. D. 1875.

AARON S. SWARTZ,
Pro Clerk.

J. WARREN COULSTON,
Proctor, etc.

6 And afterwards, to wit, on the said 19th day of March, A. D. 1875, stipulation for costs is entered on behalf of said libellant in the words following, to wit:

UNITED STATES,
Eastern District of Pennsylvania, ss:

On this nineteenth day of March, A. D. 1875, and in the ninety-ninth year of the Independence of the said United States, in open district court of the United States, personally appeared Joseph Golding and William J. McNaughton, and by stipulation in due course of law acknowledged themselves to be indebted to the United States of America, for the use of all persons who may be interested in the premises, in the sum of two hundred and fifty dollars, to be levied of their and each of their goods and chattels, lands and tenements, on condition that if the libellant in the above action shall pay all costs which by the decree, mandate or practice of the court he may become liable to pay, then this stipulation to be void and of no effect: Otherwise to be and remain in full force and virtue, and execution to issue thereon forthwith for the amount of such costs, at the instance of any person interested as aforesaid.

JOSEPH GOLDING. [SEAL.]
WM. J. McNAUGHTON. [SEAL.]

Taken, acknowledged and subscribed this 19th day of March, A. D. 1875, in open court.

AARON S. SWARTZ,
Pro Clerk, D. C.

Afterwards, to wit, on the day and year last aforesaid, process of attachment is allowed and issued in the words following, to wit:

7 UNITED STATES.
Eastern District of Pennsylvania, set.:

John Cadwalader, judge of the district court of the United States, in and for the eastern district of Pennsylvania, to the marshal of the same district, greeting:

You are hereby commanded, in the name and by the authority of the United States, forthwith to seize and attach the steamship or vessel called the Illinois, whereof J. W. Shackford is master, together with all and singular her tackle, apparel and furniture, as the same now are, and the same safely keep, to abide the final order and decree of this court, in a certain plea, civil and maritime, herein prosecuted against the said steamship, etc., by Joseph Golding, master and part owner of the schooner Ellen Holgate, libellant, for damages sur collision, etc. And you are further commanded in the name and by the authority aforesaid, to cite and admonish the said J. W. Shackford and generally all others herein concerned, so that they be and appear before me at a special session of this court, to be holden at the room of the district court of the United States, in the city of Philadelphia, on the second day of April

next, at ten o'clock in the forenoon of the same day, then and there to show cause, if any they have, why the said steamship, etc., should not be condemned, etc., for the payment of the said damages, etc. And have you then there this writ.

Given under the seal of the said court, at Philadelphia, this 19th day of March, A. D. 1875, and in the 99th year of the Independence of the United States.

[SEAL OF COURT.] AARON S. SWARTZ,
Pro Clerk.

8 And afterwards the said marshal makes return to the writ of attachment aforesaid in the words following:

"The within-named vessel not found in my district."

So answers

JAMES N. KERNS,
U. S. Marshal.
Per McCORMICK.
S. Deputy.

Upon said writ of attachment, the parties libellant and respondent, by their respective proctors, endorse the following agreement:

It is agreed that stipulation shall be entered by the American Steamship Company, claimants and owners of the steamship Illinois, with the same effect as if the said steamship had been attached and was in the custody of the marshal, under the within writ.

MORTON P. HENRY,
For the American Steamship Company, Claimants.

MARCH 23D, 1875.

J. WARREN COULSTON,
For Libellant.

And afterwards, on the 20th day of March, 1875, the said J. Warren Coulston, esquire, presents the petition of intervention of Edward Nelson Sapp, being in the words following:

To the honorable John Cadwalader, judge of the district court of the United States for the eastern district of Pennsylvania:

The libel of Edward Nelson Sapp, late steward on board of the schooner Ellen Holgate, whereof Joseph Golding is master, against the steamship Illinois, her tackle, apparel, boilers, machinery and
9 furniture, whereof Captain Shackford is master, and against all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime, alleges as follows:

First. That on the third day of March, A. D. 1875, the libellant was cook and steward of the said schooner Ellen Holgate, and at the time of the collision mentioned and particularly described in the libel this day filed by the said Joseph Golding, master of said schooner, against the said steamship Illinois (which said libel is No. 13 of 1875, upon the records of this honorable court), the libellant was on board of said schooner, and by reason of said collision he lost his clothes and personal effects then on board of said vessel, of the value of fifteen dollars, as follows:

Two pair of pants	$6 00
Coat	8 00
Bedding	1 00
Total	$15 00

Second. That said collision was caused solely by the carelessness and negligence of the said steamship Illinois and those having charge of her navigation, and not by any fault or want of care on the part of the said schooner Ellen Holgate or those having charge of her navigation.

Third. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellant prays that he may be allowed to intervene in said suit No. 13 of 1875, for his damages by said collision sustained, and that this honorable court would be pleased to decree the payment of the said damages aforesaid, with interest and costs, and that he
10 may have such other and further relief in the premises as in law and justice he may be entitled to receive.

EDWARD N. SAPP.

Sworn and subscribed to before me this 19th day of March, 1875.

ELIAS P. SMITHERS,
Notary Public, Philadelphia.

J. WARREN COULSTON.
Proctor for Petitioner.

Afterwards, on the 22d day of March, A. D. 1875, J. W. Shackford, master of said steamship Illinois, makes claim on behalf of the American Steamship Company to said steamship in the words following:

In the district court of the United States in and for the eastern district of Pennsylvania. In admiralty.

JOSEPH GOLDING, MASTER OF THE SCHOONER Ellen Holgate, *vs.* THE STEAMSHIP ILLINOIS.	Plea civil and maritime for collision.

And now John William Shackford, intervening for the interest of The American Steamship Company, of Philadelphia, appears before the honorable court and makes claim to the said steamship, her tackle, apparel, and furniture, as the same are attached by the marshal, under process of this court, at the instance of . And the said John William Shackford avers that he was in possession of the said steamship at the time of the attachment thereof, and that the persons
11 above named are the true and bona fide owners of the said steamship, and that no other person is the owner thereof; and the said John William Shackford is master of the said steamship, and the true and lawful bailee thereof for the said owner, wherefore he prays to be admitted to defend accordingly.

J. W. SHACKFORD.

and subscribed in open court, this day of , A. D. 18 .

Clerk District Court U. S.

Afterwards, to wit, on the day and year last aforesaid, the said claimant, by Henry D. Welsh, enters stipulation in the words following:

UNITED STATES.
Eastern District of Pennsylvania, ss:

Be it remembered that at a special district court of the United States,

holden at Philadelphia, in and for the eastern district of Pennsylvania, on the 22d day of March, A. D. 1875, and in the ninety-ninth year of the Independence of the said United States, before the honorable John Cadwalader, judge of said court, comes Henry D. Welsh, who, freely and voluntarily submitting himself to the jurisdiction of the said court, acknowledges himself to be indebted unto Joseph Golding, master and part owner of the schooner Ellen Holgate, in the sum of eleven thousand dollars, lawful money of the United States, to be levied of the goods and chattels, land and tenements, of the said Henry D. Welsh, to the use of the said Joseph Golding, master and part owner—

Upon condition, that, whereas a suit is now pending in the said court, for damages, sur collision, wherein the said Joseph Golding is the libellant against the steamship Illinois, and J. W. Shackford, master
12 and claimant: Now if the said claimant shall well and truly abide by all orders, interlocutory or final, of the said court and of any appellate court in which the said suit may hereafter be depending, and shall fulfill and perform the judgment or decree which may by rendered in the premises, and also pay all such costs and charges as shall be ordered and adjudged to be paid on his part, then this stipulation shall be void; otherwise in force, and execution may issue by virtue thereof, at one and the same time, against any or all the parties to this stipulation.

THE AMERICAN STEAMSHIP COMPANY,
HENRY D. WELSH, [SEAL.]
President.

Taken, acknowledged, and subscribed in open court on the day and year above written.

HENRY D. WELSH. [SEAL.]

The above-named , being duly , deposes and says that he is permanently a householder within this district, and that he is worth the sum of dollars, after payment of his just debts and liabilities.

And thereupon it is ordered that a writ of restitution issue to the marshal, directing him to restore the said steamship to the said claimant, upon payment to him of his costs and the necessary expenses by him incurred.

Afterwards, on the 22d day of April, 1875, Morton P. Henry, esq., another of the proctors of said court, presents the answer of J. W. Shackford, master of said steamship, to the libel and complaint aforesaid, which, being filed, is in the words following:

JOSEPH GOLDING, MASTER OF THE SCHOONER Ellen Holgate, *vs.* THE STEAMSHIP ILLINOIS. } No. of 1875. U. S. D. C. Admiralty.

The answer of John W. Shackford, master of the steamship
13 Illinois, to the libel of Joseph Golding, master of the schooner Ellen Holgate, in a cause of collision, civil and maritime, sheweth:

First. That it is true that a collision occurred on the third day of March, 1875, at or about ten a. m. in the Delaware Bay, between the steamship Illinois and the schooner Ellen Holgate, but respondent denies

that the same occurred off Reedy Island, and that the said schooner was beating up the Delaware Bay, or that the course of the steamship and schooner was as therein stated, but respondent avers that the truth is as hereinafter stated.

Secondly. Respondent avers that on the morning in question the steamship was going up the Delaware under steam, and with no sails set, in charge of a licensed pilot; that the tide was about half ebb, the wind was on the starboard beam of the steamship, and that the schooner which had been in sight for an hour and upwards was standing up the river with a leading wind, the wind blowing very fresh, steering in the same direction as the steamship, which had been for some time astern of and in the wake of the schooner, gradually overtaking her.

Thirdly. That when nearly half way between Dan Baker Shoal and Reedy Island Light the steamship was steering to pass the schooner to windward on her starboard side, the line of the courses of the two vessels being one hundred yards apart and nearly parallel; that when the steamship was about one hundred and fifty yards astern, and on the starboard quarter of the schooner, which up to that time had not made any tack, but had been holding a steady course, this respondent, who was standing on the bridge of the steamship, alongside the pilot, observed the schooner to go into stays, her head falling over to the eastward and across the course of the steamship, which at the time was making about eleven knots under steam alone.

14 Fourthly. That this respondent on seeing this manœuvre on the part of the schooner at once ordered the engine to be stopped, and at the same time he caused the helm of the steamship to be thrown hard-a-starboard, * * * but finding that the intervening space was too short to enable the steamship to go under the stern of the schooner, the engine was reversed at full speed, and a chain and anchor were also let go to deaden her headway through the water. But the schooner did not gather sufficient headway or speed to enable her to cross the steamship's bow, and in consequence thereof the steamship struck the schooner on her starboard side, causing her to capsize and sink. The collision occurred in less than two minutes from the time the schooner went about.

Fifthly. Respondent denies that the said collision was caused by any want of proper skill or precaution on the part of those in charge of the steamship; that the course of the steamship was directed by the pilot who had come on board at the capes of the Delaware, and who was stationed on the bridge, which is forward and elevated above the deck, this respondent, the master, having been alongside of him from the time the steamship got under way in the morning until the happening of the collision; that the ship was steering at her forward wheel-house, the wheel being fully manned, and an officer being stationed there to see that the directions given from the bridge were promptly obeyed, and that the course of the ship in steering so as to pass to the windward of the schooner and at a distance of over a hundred yards from her was proper and right in all respects, and that no collision could have occurred had it not been for the reckless mismanagement on the part of the schooner.

Sixthly. Respondent, further answering, saith that the said collision was caused solely and entirely by want of proper care and precaution on the part of the master of the sail schooner. Respondent is in-

15 formed that the vessel was short handed, and having no other officer on board, the master himself took the wheel, steering the vessel himself, his whole attention being taken up by a duty which

ought to have devolved upon a seaman, and that in consequence there was no officer of the deck to take charge of the course of the vessel; that under these circumstances the master of the schooner, being unaware of the position of the steamship, undertook to go about when the steamship was in such immediate proximity that no efforts on the part of the latter vessel could enable her to avoid the schooner; that the alteration of the course of the schooner was made without any necessity, the bay being wide at that point, the collision having occurred more than two miles below Reedy Island, and not opposite Reedy Island, as untruly stated in the said libel, and that there was no ice of any extent immediately ahead of the schooner; and that the course of the master of the schooner in altering his course at that point when the steamship was in the relative position as stated, was sheer recklessness and carelessness on the part of the schooner which no prudence or precaution on the part of those in charge of the steamship could anticipate or avert the consequences of, to the schooner, though every effort was made so to do.

Seventhly. Respondent denies each and every of the charges of negligence as set forth in the third article of said libel. Said charges of negligence can only apply to a steamship passing a vessel which was beating. Respondent denies that the vessel was beating, as is untruly alleged in the fourth article of said libel. Respondent had been all that morning on the bridge, and the schooner had been in sight ahead for over an hour, making considerable headway, and the steamship only gradually overhauling her, and that during all that time the schooner never went about until immediately before the collision. He denies that there was any ice immediately ahead of the schooner which would render it necessary for her to go about at that point, and even if
16 there was, it would not justify the schooner in delaying that movement until the steamship was in such a position that she could not by any manœuvre avoid the schooner.

Respondent has no knowledge as to the amount of the damage sustained, but he believes them to be largely overestimated, both as to the cost of repairs, the loss of time by detention occasioned thereby, and the towage bill incurred.

Wherefore respondent prays that your honor will be pleased to pronounce against the said claim of the libellant against the steamship Illinois, and will be pleased to direct the said libel to be dismissed with costs, etc.

John W. Shackford, being duly sworn, saith that the facts stated in the above answer, of his own knowledge, are true, and those stated upon information or belief he believes to be true.

JOHN W. SHACKFORD.

Sworn and subscribed before me this 20th day of April, A. D. 1875.
[SEAL.]

JOHN RODGERS,
Notary Public.

Afterwards, on the 23d day of April, A. D. 1875, on motion of J. Warren Coulston, esq., the court orders said cause to be placed on the argument list in the words following:

U. S. D. C. In admiralty. Collision.

JOSEPH GOLDING, MASTER AND PART OWNER of the schooner Ellen Holgate,
vs.
STEAMER ILLINOIS. } No. 13 of 1875.

And now, to wit, this 23d day of April, 1875, on motion of J. Warren Coulston, proctor for libellant, the above cause is ordered on the
17 argument list for Friday, April 30th, 1875. Upon the question whether admitting all the allegations of the answer to be true, the Illinois was nevertheless alone in fault.

J. WARREN COULSTON,
Proctor for Libellant.

Afterwards, on the fourth day of June, A. D. 1875, the cause came on to be heard upon the libel, answer, and proofs, and John H. Young and George T. Hewitt are appointed by the court, and sit as assessors in the cause.

The depositions on behalf of the libellant are read, and afterwards, upon the 23d day of December, the said depositions were filed, being in the words and figures following, to wit:

Depositions ex parte libellant taken by consent, and to be read in evidence on the trial of the cause.

U. S. D. C. In admiralty. 13 of 1875. Collision.

JOSEPH GOLDING, MASTER OF THE SCHOONER Ellen Holgate,
vs.
THE STEAMSHIP ILLINOIS.

MARCH 20, 1875, at 11 o'clock a. m.

Present: J. Warren Coulston, esq., for libellants; M. P. Henry, esq., for respondents.

EDWARD NELSON SAPP, a witness on behalf of the libellants, being duly sworn according to law, doth depose and say:

I was on board of the schooner Ellen Holgate at the time of this collision. I will be thirty-five years old the 3d day of next May. I reside at 1527 Alimendo st., Port Richmond, Philadelphia.

18 I was cook and steward of the schooner Ellen Holgate at the time of the collision with the steamer Illinois. It occurred the third day of March instant in the Delaware Bay, off Reedy Island. The wind at the time was about northeast, as far as I could judge. We were under way at the time, beating—not exactly beating—we were working away among the ice. If it had not been for the ice we would not have had to beat that reach—I mean the one on which the collision occurred. At the time of the collision we were standing a course about east-southeast. That was a starboard tack. We had our port tacks aboard. It was a tack to avoid a field of ice. The tack we were on was taking us right across the bay. At the time of the collision I was on deck, standing about ten feet aft the mainmast, on the port side. I was doing nothing at the time. I had been there about a couple of minutes. I was on deck before the collision about three quarters of an

hour, I should judge. We had just gone about before the collision. We had just began to get under full headway before the collision. Before we went about on the course we were at the time of the collision, we were heading a course about northwest. We had not been standing a steady course, we had to round some in order to avoid the ice. The tide was ebb. I think it was about the first of the ebb. We went about on the tack we were at the time of the collision to avoid a field of ice that was under our port bow. Captain Golding was at the wheel when we went about. When we went about we went around in stays to the right.

Question. Up to the time that you went in stays to go about, had you had any warning that the steamer Illinois was approaching?

Answer. No, sir; I saw the steamer Illinois just as soon as we got in stays; I think she was off from us then about three hundred yards. She bore, as near as I can judge, about south from us, and was off our starboard quarter when in stays. I was then standing on the port side, just aft of the mainmast.

We got out of stays and pulled off on a course about east southeast. We were pretty close to the wind on that course. When we had filled off, the steamer was about two hundred or one hundred and seventy-five yards from us, and heading across our bow. The steamer then was under good headway, I should judge about thirteen knots. She struck us, her speed was not off of us yet, and took us stem on about just aft of our main chains on the starboard side, cutting into us about six feet, I should judge. The result was that the schooner filled with water, and we had to get out of her, which we did by going up the rattlins on to the bow of the Illinois. About ten minutes after the collision I saw the schooner capsized. The captain and the rest of the crew staid by her. We got off the Illinois on to the tugs Col. S. L. Brown and *and* the tug Young America. These tugs towed her up into Reedy Island piers. There was a great deal of ice in the bay at the time: it was pretty solid ahead of us. Before the schooner could be towed we had to take some of her spars out of her; to do this we had to cut some of the rigging. I was with the schooner eight days after the collision; I then left, with permission of the captain. The rest of the crew and captain were still with her when I left.

I have been going to sea as cook and steward about five years. I can steer a little. I don't understand the duties of a sailor a great deal; it is not my business. I know courses by the compass; can tell which way the wind is blowing. I have frequently in my time lent a hand as sailor in cases of necessity.

Cross-examined:

This collision occurred about 10 o'clock in the morning. We had not reached Reedy Island light at the time of the collision; we were about a mile below it, probably more. I had seen the steamer Illinois two or three hours before the collision; that was when she was away down below, we could see it was a steamer, but of course did not know which steamer she was. I know the Dan Baker buoy; I should judge we were a mile or more above this buoy; I could not say, as I am not acquainted with the distances or points there.

Before going about just before the collision, we had held the same tack from the time we got under way from under Cohansey Light, about 8 o'clock in the morning. We varied our course some to avoid the ice. We went about on account of the ice, and not on account of the wind. My attention was not called to the steamer from the time I

first saw her until after we got in stays, because we had all we could do to look ahead and take care of the ice. This occurred in about mid-channel. This ice we tacked for was field ice. There were many floating cakes and very heavy; we had four sails set, two jibs, foresail, and mainsail. I and the captain had just hauled aft the main sheet and trimmed it when the collision occurred. I desire to correct this: It had been trimmed about eight minutes after we went in stays and before the collision. The captain assisted in hauling it aft and trimming it. He didn't exactly leave the wheel to do it, he put it in a becket and it held itself. He left it in that way. This was before the collision. We done this work before we saw the steamer. We never saw the steamer until we filled off, and I judge the captain did not, as we were watching ahead. There were four of us all told, including the master. The mate was not with us at the time. Two seamen, myself, and the master. I think the main jib was let go before the collision. The captain did not attempt to throw his vessel up into the wind again after the steamer was seen. He did not let go the main sheet that I know of. I should judge we were about eight minutes in stays before we got filled off. There was a good breeze blowing. The vessel was light. I have no notion what headway we were making.

Re-examined by Mr. COULSTON:

I took the place of the one man, seaman, that we were short.
21 When I was not cooking I was out on deck working. I had been on deck helping about three-quarters of an hour before the collision. We had very heavy weather, blowing a right good breeze, and hailing and sleeting at the time. The weather was not very thick; you could see a couple of miles or more. There were no other sailing vessels in the immediate vicinity of the collision. The tugs Young America and Brown were following right after us. The tug Young America was a couple of hundred yards off, and the Brown closer. I saw no man on the bridge of the steamer. I did not take particular notice at first, but it is customary to see a man there, and I looked and didn't see a man there. It is customary for a man to be on the bridge all the time when she is running, especially along the coast.

EDWARD NELSON SAPP.

Sworn and subscribed before me this 20th March, A. D. 1875.

S. P. HUTCHINSON,
Notary Public.

BENJAMIN WATERS (colored), a witness on the part of the libellant, being duly sworn, says:

I am 28 years of age; I reside, when I am at home, with Edward Lamott, Front and Lombard streets, Philadelphia. I have been going to sea twelve years; I have been shipping as able seaman for ten years, going both foreign and coastwise. I was one of the seamen of the Ellen Holgate at the time of this collision. I was on deck, forward, tending the jib. I know the steward, that is the man who is here now, and has just been examined. He was on deck at the time, too; he was aft with the captain; at the time he was taking a hand. The collision occurred about 10 o'clock in the morning, on a Wednesday, early in this month, the first Wednesday in the month. On that morning we
22 got under way after breakfast, about half-past seven or eight o'clock. When we got under way we were lying in a place on the Jersey shore, above Joe Flogger; we had the four mainsails set, the mainsail, foresail, and two jibs. I don't recollect exactly what

course we took up the bay after we got under way. We were bound up the bay; we were heading pretty well up the river; we kept that course until we had to go about, on account of a field of ice off our port bow, ahead, near Reedy Island. When we went in stays there I was forward tending the jib. Up to that time I never saw the steamer Illinois; I had not heard any whistle or warning from her. At the time we went about the wind was about northeast, and blowing very hard, and pretty thick, kind of rainy, sleeting weather. I don't know exactly; we could see about two hundred yards. I don't know how the tide was when we went about, it was flood when we got under way. I never saw the steamer at all, until about two or three minutes before she struck us; she was coming about amidships, right for us, when I saw her, and about a hundred yards off, more or less, I could not tell. When we went about we were on the wind, and had filled off before the collision. I guess we had not been about and filled off more than ten minutes or five before the collision. I saw no sailing vessels near us. I saw the tugs Brown and Young America before the collision. The captain was at our wheel from the time we got under way until the time of the collision. The steamer struck us on the starboard side about the main rigging. She cut into our deck about six feet, I guess; she cut smack into her to her main hatch. All hands got off her on to the steamer, after the collision, then we got off the steamer on to the tug boat. The schooner turned over after the steamer backed out of her. All hands lay by her in the tug, and cut her rigging, and took her spars out so as to tow her. The ice was pretty heavy in the bay—at ice—fields of ice. After a field of ice run over the schooner the tug-boats got hold of her and towed her; the ice broke off her jib-boom. The tug-boats towed her into the breakwater
23 above Reedy Island piers; from there she was towed to Delaware City, and from there to New Castle. At New Castle the divers went down and patched her up, and she was towed to Wilmington. At Wilmington she is now hauled out for repairs. I stayed by her all this time until she got to Wilmington.

Cross-examined by Mr. HENRY:

Before we went about I was looking out for fields of ice ahead. We were about two miles below Reedy Island light. The channel bay was pretty full of ice. We were going on the bay side of Reedy Island. Up to that time I hadn't seen the Illinois. There was another sailor besides myself, forward, looking out for fields of ice. There was just room to go about and clear the field of ice; it was so large I couldn't see across it; we couldn't see farther than two hundred yards. The ice was heavy field ice, not broken ice. I couldn't tell how broad this field of ice was. I guess the river, where the collision took place, is about a mile and a half wide. We could see the open water on the starboard tack, when we went about. We couldn't go any further on the port tack for the ice. After we went about, the captain did not try to throw the vessel up into the wind again; not as I know of; I don't know anything about that. Before the collision nobody let go the head-sheets; the jibs were both full when we were struck. We hadn't time. One jib, the main-jib, was trimmed all the time; you could just draw it away and make it fast; the other jib was trimmed down before the collision. I had not been in the galley that morning; I was on deck all the time after we got under way.

his
BENJAMIN × WATERS.
mark.

Sworn and subscribed this 20th day of March, A. D. 1875.
[SEAL.] S. P. HUTCHINSON,
Notary Public.

24 *Deposition ex parte libellant taken by consent and to be read in evidence on the trial of the cause.*

U. S. D. C. In admiralty. 13 of 1875. Collision.

THE SCHOONER ELLEN HOLGATE
vs.
THE STEAMSHIP ILLINOIS.

MARCH 25th, 1875, at 10.30 a. m.

Present, J. Warren Coulston, esq., for libellant; Morton P. Henry, esq., for respondent.

EDWARD JOSEPHS (colored), a witness on the part of the libellant, being duly sworn, deposes and says:

I am 20 years of age. I follow the water for a living; I have been following it for six years. I have sailed both foreign and coastwise. I know the schooner Ellen Holgate; I was one of her crew at the time of the collision with the steamship Illinois. I was forward on deck at the time of the collision. I was shifting the head-sheets. I was tending the flying jib. We went about before the collision. I did not see the steamer before we went about. I heard no warning from her; no whistle. We went about because there was a field of ice ahead of us that we could not go through. The captain was at our wheel. I first saw the steamer after we went about. We had filled off when I first saw the steamer. The steamer was off from us then about three hundred yards. At that time she was heading for us right abeam. The steamer struck us at the main rigging, on the starboard side. She struck us a hard blow. She was under way, coming ahead, at the time she struck us. She cut us about four feet deep. Our vessel capsized and sunk. The steamer got clear of her by backing out. All hands left the schooner, before she backed out, by getting up on the steamer's bow. From
25 the steamer all hands went on board a tug that came alongside. The tug with our crew lay by the schooner.

When she capsized the ice ran right on top of her and broke her jib-boom. After that the schooner was taken in tow by two tugs. I know the name of one tug, it was the Young America. Before the tugs towed the schooner they pulled the spars out of the schooner; this was done so that they could tow her and save the vessel; the tugs towed her first to Reedy Island. This collision occurred off Reedy Island. After that they towed her to a place, the name of which I don't know. Then they towed her to a third place; that was New Castle. The divers came there and patched her up; then she was pumped out and towed to Wilmington; there she was hauled out for repairs. I stayed by her all this time; I helped to save the vessel. I didn't take notice how the wind was at the time of the collision. I didn't take notice what courses we were steering before and after we went about. Where the collision occurred the bay was wide. It occurred on Wednesday. I don't recollect the day of the month. It was two or three weeks ago. It occurred in the forenoon. We had been under way about two hours. We got under way in the morning, about two hours before the collision occurred.

I live in the West Indies. I am an able seaman and shipped as able

seaman on this vessel. I have been going as able seaman about four years. The weather was blowing pretty heavy and rainy and sleeting. The weather was not thick. There was no fog. You could see a good distance. I didn't see any other sailing vessel in the neighborhood. The two tugs were pretty near us when the collision occurred.

They were not in our way. I couldn't tell how far they were off, because I was busy and not looking at them.

Cross-exaimned by Mr. HENRY:

Our vessel was light. She wasn't going very fast because we were amongst the ice.

26 This was the first tack we made that morning when the ice came over the schooner and broke the jib-boom; I was on the tugboat. The steamer Illinois was off then and had gone up the river.

his
EDWARD + JOSEPHS.
mark.

Sworn and subscribed this 25th day of March, A. D. 1875, before me.
[SEAL.] ELIAS P. SMITHERS,
Notary Public, Philadelphia.

Deposition ex parte libellants taken by consent and to be read in evidence on the trial of the cause.

U. S. D. C. In admiralty. No. 13 of 1875. Collision.

JOSEPH GOLDING, MASTER OF THE SCHOONER Ellen Holgate,
vs.
THE STEAMSHIP ILLINOIS.

MAY 5TH, 1875—at 1 o'clock p. m.

Present, Mr. Coalston, for libellant; Mr. Edmunds and Mr. Henry, for respondent.

JOSEPH GOLDING, being duly sworn, says:

I was master of the schooner Ellen Holgate, of Philadelphia, at the time of this collision. I am 54 years of age. I have been master mariner about 20 years. During that time I have been engaged exclusively in the coasting trade. The collision occurred about the lower end of Reedy Island, a little below the point of the island, I think, and pretty near in midchannel. It occurred on the third day of March, 1875, about

27 ten o'clock in the morning, I think. The tonnage of my schooner is 168 registered. I was bound to New Castle, Delaware, light, for a load of grain. I was chartered for that cargo. I got under way that morning at the mouth of Cohansey Creek, I should think, between 6 and 8 o'clock in the morning; I can't tell exactly. The wind was about northeast when we got under way, and it was more easterly when we got up near Reedy Island. From Cohansey I steered up the channel; I didn't run any particular course, I suppose about northwest by north, that is what I tried to run.

We couldn't do it all the time on account of the ice. We had to keep off and luff at different times to clear cakes of ice, till we got up above Dan Baker's Shoal. When we got above Dan Baker's Shoal, we hauled up closer by the wind. We hadn't a clear course none of the time on account of ice. We had four sails set, main-sail and fore-sail and standing jib and flying-jib. I should think then the wind was about north-

east-by-east, blowing pretty fresh and hailing and raining. There's where the trouble was, you could not see much. You could see ahead a good distance, you could not see to windward because the hail would cut your face. I was watching the ice. I could see astern, I suppose, as far as I could see ahead. It was not foggy, nothing more than misty weather, thick. I went about before the collision. Before I went about we had hauled up closer to the wind for about four or five minutes to clear a cake of ice. We were within five points of the wind during that four or five minutes, I suppose. When we were running up below we were not so close to the wind.

Q. Were you beating up the bay?

A. No, sir.

Q. Please say whether you had been beating at any time after you got under way, or whether the changes you made in your course were occasioned only by the ice?

A. We didn't tack until we tacked for the ice at the time of the
28 collision; we had no occasion to. After we got up above Dan Baker's buoy, the river changes its course, and we had to haul up closer to the wind. Before we got up to Dan Baker's buoy, occasionally we changed our course to avoid ice, we would go to windward or luff as occasion required.

I can't tell you, but I think the tide was about high-water, slack or the first of the ebb.

I myself was at our wheel. I had on deck four men. There were two men before the mast and the steward and myself.

Q. Whose place did the steward take?

(Question withdrawn.)

Q. Does the steward understand seaman's duty?

A. Yes, sir.

Q. Where was the mate?

A. He had come to Philadelphia.

Q. Who was acting in his place from the time you got under way at Cohansey up to the time of the collision?

A. I had to use the steward.

Q. Did or did not the steward take a hand on deck from the time you got under way until the collision occurred?

A. Yes, sir; all the time he did.

Q. Why did you go about before the collison?

A. For a large quantity of ice, a field of it, probably ten acres or more.

Q. When you attempted to go about how close were you to the wind?

A. I think we were about may be four and a half points from the wind; I can't tell exactly.

Q. Did you go about quickly or slowly?

A. Very slow, indeed, and I thought she wasn't going to come around; I thought she was going to fall off on the other tack again.

It is a very hard thing for me to tell how long it took us to go about; it appeared to me it was several minutes before we got around and started ahead again. I did not see the steamer before I went
29 about. I had seen her that morning; I seen her away down below Liston's, I expect. I had too much ice to look for that morning. I wasn't looking back for steamers at all. When I tacked her I hove my wheel hard down to bring her to the wind.

Q. From the time you commenced to go about and while you were in stays, had you any signal from the steamer that she was in close proximity to you?

A. Nothing, sir; no whistle, nor nothing of the kind.

Q. When did you first discover the steamer?

A. After the vessel filled off and started ahead. I was watching her sails and hallooing to the boys to haul away the jibs and so forth, and I then looked to leeward and saw the steamer.

Q. Were you still at the wheel?

A. Yes, sir.

Q. When you saw the steamer, what did you do as to the course of your schooner?

A. I held my course; I couldn't alter it.

Q. How far off from you was the steamer when you first observed her?

A. Well, sir, I can't tell the distance, but I should think between two and three hundred yards; somewhere about that; it was most impossible for me to measure it.

Q. It has been testified by Captain Shackford that after your schooner went about and filled off, you attempted to tack again before the collision; is this true?

A. No, sir; I didn't think of such a thing; I hadn't time to. When the vessel started ahead, I suppose she was going four or five knots. When the steamer struck me I can't tell how fast she was going; I think seven or eight knots. They had checked her with her anchor a good deal. The steamer struck us just about the main chains on the starboard side. She cut us in to the floor heads, through her deck and bends, ceiling, and so forth. She did not carry away any of the
30 rigging; she stove it all in. The vessel filled with water in about ten or fifteen minutes and capsized, and nearly sunk. My crew and I let her sails run down, and by that time they sent a boat to us from the steamer and took us aboard. From there we went to the tugs. We went on the tug S. L. Brown; the tugs Brown and Young America towed us to Reedy Island Piers. About a quarter or half an hour after the collision the ice came down on the schooner and broke her jib-boom and turned the mast-heads under water. I can't tell the exact length of time that the ice came down, but it was very soon after the collision.

Q. Was there anything that you could have done to have avoided this collision?

A. Nothing in the world that I know of.

I saw the anchor let go from the steamer. At the time she let the anchor go I don't think she was under full speed; I can't tell you; I was watching my vessel too much.

Q. When you first saw the steamer to leeward how was she bearing, as to your vessel?

A. She appeared to me as if she was trying to cross our bow, but we were crawling on her so as to bring her more amidships.

Q. Did you see the head of the steamer change any from the time you first saw her to leeward until the time of the collision?

A. I don't know that I did see her change any at all. I couldn't tell as we were going by her, crossing her bow, whether she was changing or not.

Cross-examined by Mr. HENRY:

I suppose when I first saw her off Liston's she was three miles, may be more, distant. I never recollect seeing her after that; I suppose I was somewhere in the neighborhood of Dan Baker's Shoal, when I saw her down somewhere towards Liston's. I do not recollect noticing Dan Baker's Buoy, so I cannot speak positively. I helped to haul the
31 main-sheet—I and the steward. I sent the steward forward to

back out the foresail and I took in the main-sheet myself; I becketed the wheel.

Cross-examined by Mr. EDMUNDS:

I think I was above buoy No. 21, but I was away out in mid-channel. I could have held my course for a mile and a half further if it had not been for the ice, but I was forced to tack. Before I went about the steward was on deck, and I hallooed to him to come and help me take in the main-sheet. I didn't go forward. I becketed the wheel and hauled in the main-sheet. I didn't go off the quarter deck. I hauled the main-sheet mostly myself. When she came up to the wind I could handle it as well as two or three men.

Two of the crew were colored. The steward was a white man. One of the crew I had with me over a year, Ben Walters, one of the men that was forward. I shipped the steward at Philadelphia. He joined the vessel here, and went with me down east and returned.

This was the first trip the steward made with me. The mate left me in January, down at Mahone's Ditch in the Delaware, where I had been frozen up. I think we had breakfast that morning between five and six o'clock, probably 6 o'clock, in the cabin. The steward did not eat with me. The steward and crew ate after I did. The breakfast was before I got under way. I went down in the cabin to put on my oil cloths after it began to hail and rain. I don't know where the vessel was then, but we were a long way below Liston's. It wasn't storming when we got under way, and I didn't think it was going to. For all I know, that is the only time I was down in the cabin, when I put down my oil cloths, but I don't recollect about it. I might have been down two or three times, but if I was it was only just an instant.

Q. Are you willing to say positively that you were on deck, at the wheel, when you went around Dan Baker's?

A. No, sir; I won't; but I think I was, for I was looking around for the buoy.

32 Q. Who took the wheel when you went below?

A. I think Ben Walters had it when I went below. Then we were steering straight up the channel, you know.

Q. This was after you first saw the steamer, wasn't it?

A. When I was up at Dan Baker's Shoal I had seen the steamer, but it is a hard matter for me to tell whether I had been below or not at that time. I don't think I went below after that. When I first saw the steamer she was a long way off, but when I came up along Dan Baker's Shoal I thought she was an ocean steamer, but she was so far off I didn't bother about her.

Q. Do you know how far your vessel was to the leeward of the steamer when you went about?

A. No, sir, I don't.

Q. You know you must have been to the leeward?

A. I can't say that we were to leeward of her at all. She might have been coming quartering to us. I can't tell nothing about her, because I didn't see her.

Q. Nobody on board of your vessel said anything to you about her—the steamer—did they?

A. No, sir; when the steamer struck her blow glanced aft a little. It struck one of the beams and glanced aft. There is nothing in my log, because I lost everything except the suit I stood in. There was a tug near me before I went about, but I can't tell how far off it was. When I went about I don't know what became of the tugs. The tugs were

not far off. I can't tell the distance. When I went about I can only say that one of the tugs was on our port hand or astern of us. I saw there was going to be a collision, and I had enough to do to take care of my vessel.

Re-examined by Mr. COULSTON:

Breakfast both for myself and the crew was all over before I got under way. I don't remember being below but once, and then I went
33 to put on my oil cloths. I might have been but I don't recollect it now. When I was below putting on my cloths we were running right straight up the river, clear of the ice then most of the time. I saw this ice ahead of us before we went about for two or three minutes. I saw we had to tack. I was holding the vessel up to clear a large cake of ice, and then I let her fall off again, and then I had to tack to clear this field of ice, and she was not under much headway when I went about. If I had had a little more room my vessel would have tacked in half the time.

Q. You were on deck and at the wheel the whole of this time, were you?

A. Yes, sir; all the time.

JOSEPH GOLDING.

Sworn and subscribed this 5th day of May, A. D. 1875, before me.
[SEAL.] S. P. HUTCHINSON,
Notary Public.

And afterwards, upon the said 4th day of June, the depositions on behalf of the respondent are read, and the same being afterwards, on the 25th day of June, 1875, filed, are in the words following, to wit:

Depositions ex parte respondents, taken by consent and to be read in evidence on the trial of the cause.

U. S. D. C. In admiralty. 13 of 1875. Collision.

JOSEPH GOLDING, MASTER OF THE SCHOONER Ellen Holgate,
vs.
THE STEAMSHIP ILLINOIS.

APRIL 26, 1875, at 11 a. m.

Present, J. W. Coulston, esq., for libellant; Morton P. Henry, for respondents.

34 Mr. Coulston objects taking any further testimony in this cause until the motion for hearing upon libel and answer is disposed of.

EDWARD MAULE, being duly sworn, deposeth and saith:

I was pilot of the steamer Illinois when she had the collision with the schooner Ellen Holgate. I went on board at the Delaware Breakwater. I was on the bridge at the time of the collision. I had been there since six o'clock. The captain was alongside me; he had been there since the same time—about six in the morning.

The collision occurred about half-way between Reedy Island and Dan Baker Shoals, as near as I can say. The collision occurred about half

past ten in the forenoon. The distance between Reedy Island and Dan Baker Light is about two miles. The schooner had been in sight an hour or an half an hour.

After rounding Dan Baker Shoal we steered up the river on our usual course, with the schooner on the port bow some 200 yards ahead of us. The course of the schooner and steamer going up the river were nearly parallel. May have been ½ a point difference; I can't be exact.

The schooner was heading a course which would take her above Reedy Island piers. I did not see anything to hinder her. The wind was on the starboard side of the schooner. The wind that morning was about from east-northeast to northeast.

The tide was ebb. The speed of the Illinois was, I should judge, about ten knots—in my judgment. I can hardly answer what was the difference between the speed of the two vessels. The steamer was undoubtedly going the fastest. The wind was a good, strong whole-sail breeze. I saw the schooner go about.

When the schooner went about she was on our port side, about, perhaps, 200 yards distant from us.

35 If the schooner had held her course we would have passed her 100 yards off, perhaps, on our port hand, and passed on her starboard side.

When the schooner went about I gave the orders and the captain rung the bells.

The engine was slowed down, stopped, and reversed. The helm was put to starboard as soon as we saw the schooner tack.

(Mr. Coulston objects to this witness testifying as to what was done with the helm unless he was at it.)

I gave the order. I know it was obeyed. I saw the man turn the wheel. I can see the men at the wheel from where I stand on the bridge. The helm was put hard-a-starboard. We struck the schooner a little abaft the main rigging. The schooner could not have had much headway on her; he had thrown his vessel up in the wind and had lost his headway in a manner.

I do not think there is anything on the bridge which shows how the helm is; I don't recollect.

There was some ice in the river. The nearest ice to our vessel at the time of the collision, I think was about 300 to 400 yards; it is hard to tell. The channel was clear ahead of our vessel.

After we struck the schooner we got under weigh again, and proceeded up the river in about a half to three-quarters of an hour. During that time we were taking the people of the schooner, and put them on board the tug-boat. Hold on! I believe the crew of the schooner came on board the steamship.

The steamer was at anchor after the collision. During that time there was not a heavy body passing the steamer.

In going round Dan Baker we went a slow speed. After getting 'round Dan Baker Shoal we went a little faster a few moments, until this vessel tacked, and then we slowed down and reversed and went back in the engine.

If the schooner had continued her first course there would have been no collision, and if she had kept her course after she had tacked there would have been no collision.

36 Q. What did she do after she tacked?

A. He undertook to tack again, and that threw his vessel up in the wind, and then he lost his headway and the collision occurred. The schooner had made no tack that I saw before on that morning.

Cross-examined:

It was a very stormy morning; there was a whole-sail breeze; rainy and sleety.

I don't think there was any whistle from the steamer before the collision. We were not exactly astern of the schooner; we were on a parallel line or nearly so, and I should judge we were about 200 yards astern of her before she tacked.

To tack she went in stays first; I mean before she went about. When the schooner got about I should judge she was about 200 yards from her, as near as I can tell; may be not quite so much.

Q. Do I understand you to say that from the time the schooner first began to tack, and until she had got fully about, that there was no difference in the distance between the steamer and the schooner?

A. No, sir; I don't mean that.

Q. When the schooner first began to tack you were running about 10 knots, were you not?

A. I should judge we were. I do not know the exact speed of the vessel.

Q. You could not tell what course the schooner was going to take until she got about, could you?

A. I could tell she was going to tack when he put his helm down.

Q. Could you tell the exact course he was going to take until he got fully 'round?

A. There was only one course for him to take, and that was to stand with his port tacks aboard, if he intended to go that way. I cannot always tell what a man's intentions are. He went 'round to starboard; he put his port helm down.

37 Q. How long was it from the time the schooner first attempted to go about until the captain rang the bell?

A. Immediately. The helm was first to starboard, and then the bell was rung. I don't think I could hear what bell was rung, and I do not know.

Q. Had the schooner filled off before the collision occurred?

A. Yes, sir.

I hardly know how to answer how long the schooner's sails had been full before the collision, it was so short a time.

I can't tell the time that elapsed from the time the schooner first began to go about until the collision. It was a very short time.

When the schooner attempted to go about the second time we were not almost on her; if he had held his course we would have cleared him; there was time enough for that.

I suppose we was perhaps 50 or 75 yards off when the schooner attempted to go about the second time.

I do not know the full speed of the steamer.

The steamer was steering (after rounding Dan Baker Shoals) and took her course north-northeast, and the schooner was steering nearly the same course.

Elsinburg Point bore northeast-by-north from us.

Our course was taking us straight up the river, about mid-channel. The schooner was heading a little more towards Reedy Island. There was about a half a point to a point different from the two vessels.

I know there was some slight ice close to the land, but nothing to hurt anything. There was no ice where we were; no field of ice.

There was ice on the lee shore; small, jumbled up ice; no field of ice.

There was heavy lumps of ice, but I would not call it fields of ice.

The schooner had not varied her course that morning in order

38 to clear ice; there was no ice to bother anybody. There was nobody on the bridge except myself and the captain. I am positive about that. The bell-pull is right on the bridge. There is no house aft of the bridge, as you go off the bridge. I do not think there is a house abaft the bridge; I am sure there is none forward.

EDWARD MAULL.

Sworn to and subscribed before me, this 26th day of April, A. D. 1875.

[SEAL.] JOHN RODGERS,
Notary Public.

JOHN W. SHACKFORD, being duly sworn, says:

I was the master—and am now—of the steamship "Illinois" at the time of the collision.

The vessel is over 360 feet long, over all. The bridge is a little forward of the middle of the ship, and about seven or eight feet above the spar-deck. The bridge crosses over the top of the deck-houses; part of the top of the house constitutes the bottom of the bridge. The forward end of the bridge and the aft end of the wheel-house are about on a line. We can see the wheel-house from the bridge. The wheel on this morning was manned by a quartermaster, then seaman, and the third officer superintending. On this morning I was on the bridge; I had been there, excepting twenty minutes, ever since the vessel had got under weigh. I went down to get my breakfast in the chart room, under the bridge. I got back to the bridge about half an hour before the collision. The schooner had been in sight from half an hour to an hour. Noticed no other vessel ahead of us at the time of the collision, a half an hour before.

The ship was not going full speed; that is, she was not going as fast as she could go; that is what I mean by full speed. I do not give the orders what steam to carry.

Before rounding Dan Baker Shoals we were going possibly ten
39 knots through the water. In going round Dan Baker the order was given by the pilot. I saw that they were executed. In going round Dan Baker the orders were given to slow; the helm was put to port to turn the buoy.

After we straightened up on our course to pass Reedy Island, the schooner was in sight, ahead of us, a little on our port bow. We were approaching her. Orders were again given to port, in order to give her a little better berth. I noticed, and remarked to the pilot that the schooner would not have to tack, as she was heading to the windward of Reedy Island piers. Proceeded, and when about 200 or 250 yards distant from the schooner, observed her going into stays; the pilot immediately ordered the helm to be put to starboard and the engine to be stopped, which was done simultaneously. Immediately afterwards order was given engine to be backed full speed, and I gave the order to let go the anchor. The signals were given for the engines to be backed full speed, by the time the helm was hard over. Backing the engine, and stopping and reversing, instantly throws the ship's head to starboard.

I could see from my position that the chain was let go immediately. I could see the anchor on the bow from the bridge.

If the schooner had held her course, the steamer would have passed from 100 to 150 yards from her.

The anchor was overboard before we struck the schooner, and considerable chain had run out, but I don't exactly know how much.

We were probably about 250 yards from the schooner—directly from her—when she was in stays. We were from 150 to 200 yards astern of her at that time; that is to say, if we had been dead in her wake.

The steamer was probably going 10 knots through the water, at the time we observed the schooner was going about.

Before the schooner went into stays, I should judge she was going 6 to 8 knots. I do not know the speed definitely.

When the steamer struck the schooner the schooner was not going over 2 to 3 knots.

40 There was not more than two minutes and a half from the time the schooner was observed in stays and the collision at the outside.

There is a tell-tale leading back from the rudder, which shows whether the orders are obeyed. I did observe on this occasion by the tell-tale, that the orders had been obeyed. I had no sail on my vessel that morning. The morning was sleet, squalls, and occasionally it would light up.

There was ice on the shoal and on the land; small pieces of ice. The channel in the vicinity and ahead for miles was clear for any vessel.

We laid at anchor from twenty minutes to half an hour. Ice came down just as we had got under weigh; not fields, but detached pieces.

I would say field ice consisted of large fields, perhaps for 150 to 200 yards in diameter; solid ice that would interfere with the navigation; and small pieces I would call rotten, broken ice.

I do not know how long the tide had been running ebb. I know it was running strong ebb at the time.

That day, in port, met ice in any quantity, somewhere between Reedy Island and Fort Delaware; certainly not until we got above Reedy Island.

On that morning we could see from the bridge from 3 to 10 miles, but never less than three, until after the collision occurred.

There was stationed forward a man on the lookout, and an officer forward. The ship's company were generally employed about the ship, getting up ropes, clearing decks off, etc.

I did not observe any other vessels in sight, except the tugs, at the time.

I recollect Dan Baker buoy. I am not prepared to say how long we had passed it when the collision occurred.

Cross-examined:

41 The wind was to the eastward. I do not know what course we were steering. I am not prepared to say whether the wind was north'ard or south'ard of eastward.

I can only say, as we were heading up the channel, after rounding Dan Baker, that the wind was on the starboard beam, perhaps a point or two forward of the beam.

I saw ice ashore, on Reedy Island beach, after we passed Dan Baker buoy. I did not notice any broken ice off on our port bow or beam within a mile. Broken ice does sometimes travel in large bodies and drift together. There was not such ice within a mile of the collision.

The water was clear for a mile ahead, and a quarter to half a mile to the leeward, when the collision occurred.

Q. How long did it take the schooner to go about?

A. It took the schooner from the time she attempted to go about until she filled, to go to the opposite tack—from half to a minute.

Q. During that time what was doing on board your steamer?

A. The helm was put hard to starboard, the signal was given to stop the engines and back full speed, the anchor was let go immediately

after these orders had been given to the engine-room; that was all. There was no signal by whistle, I don't think.

Q. If the order had been given to back full speed, and to put the wheel hard-a-port, which way would the head of the steamer have gone?

A. Probably to starboard slowly, but not certain, as these ships sometimes throw their sterns to windward in backing full speed in a strong breeze.

Q. Have you not stated that in putting wheel hard-a-starboard, and backing at full speed, that the ship's head was thrown to starboard?

A. I have not. If I have, I was mistaken.

Q. How did the head of the steamer swing on this occasion after you had ordered your wheel hard-a-starboard, and ordered full speed back?

42 A. Upon first putting the helm hard-a-starboard, the ship's head went slowly to port. After backing full speed, the course of the ship remained probably about the same.

Re-examined:

Mr. Henry reads to the witness his testimony at page 12:

"Backing the engine, and stopping, and reversing instantly throws the head to starboard."

Please explain.

A. It should have been, stopping the engine and reversing instantly full speed has always a tendency to throw the head of a ship with the right-handed propeller to starboard.

Q. In answer to Mr. Coulston's question on page 16 (Mr. Henry reads it):

If I said so I was mistaken. In this instance I stated we stopped the engines, put the helm hard over, and after that was done the order was given to reverse at full speed. I said, in my examination in chief, that the order was given simultaneously.

Q. If you reverse after the helm is hard-a-starboard, what is the effect?

A. It depends a good deal upon the wind.

Q. Is there any difference in the direction the ship's head will take between starboarding the helm while the engine is being reversed at full speed, and reversing after the helm has been put to starboard?

A. Usually there is, but it depends somewhat upon the wind. With a strong breeze, with the wind in any direction, a steamer like this—I mean the wind on either side a ship—usually backs a quarter to windward.

In a calm, with a right-hand propeller like ours, the ship's head goes to starboard when the engine is backing.

Q. If your vessel, as you say, is 360 feet, if you had attempted to go ahead with a port helm, what would have been the effect?

43 A. The schooner would have run to us, or we might have struck her 50 feet further forward. No earthly power could avoid a collision after the schooner had put her helm down. That is my opinion.

Q. If you had put your wheel aport and backed, would that have avoided a collision?

A. No; it would not.

In rounding Dan Baker we went under one bell. Before the schooner put her helm down we had run up again, perhaps two to three minutes. I do not recollect any other orders as to speed, except what I have stated. I might state that when we first saw the vessel go about our first object was to clear the schooner with a starboard-helm, but I do not think it was possible to have done so, even had the schooner con-

tinued full on her first tack, but it became utterly impossible when he attempted again to tack.

Recross-examined:

Q. Then, I understand you to say that as soon as the schooner tacked there was at once danger of collision?

A. Undoubtedly.

Q. Had you and the pilot any conversation about the schooner before the collision and before any orders were given?

A. No other except what I have stated, that I remember.

Q. All the orders were first given by the pilot, were they not?

A. The orders in regard to the stopping the engine and the wheel were given by the pilot. The order to drop the anchor I gave myself without consulting the pilot when I saw the collision was inevitable. I think I gave the order to drop the anchor myself, and did not receive it from the pilot.

Q. Is it your custom to allow your pilot to give orders when there is danger of collision?

A. I have instructions from the company's agent that the
44 pilots have sole charge of the ship while in the river, and that I am not to interfere unless I see him doing something which in my judgment is wrong.

Q. Have you any instructions as to which pilots to take?

A. I have none, in coming up the river into port.

Q. How long have you had charge of a large steamer coming into the port of Philadelphia?

A. Since March, 1874.

It is always my custom to take the first pilot offering on entering the bay and coming up the river.

Q. Are not large steamers difficult to manage in stopping, backing, and quick manœuvering?

A. I should say not; it takes more room than a small one; these steamers are the handiest ships I have ever been aboard of in nine years' experience.

Q. Did you make any inquiry as to the competency of this pilot?

A. I think I asked one of the officers if they knew him. I cannot tell what officer, probably the second officer. I am not certain whether I asked him or not, but I do sometimes, being a stranger on the river, ask the officers who have been sailing out of Philadelphia longer than I have if they know the pilot. I do not remember whether I did so in this instance or not.

Q. You could see the schooner distinctly without any hinderance from the sleet and rain?

A. I could. I could see Reedy Island Piers, which were about two miles further away than the schooner.

Q. Was any word passed from the man on the lookout to you and the pilot before you observed the schooner in stays?

A. The vessel was no doubt reported when she was first observed; that was half an hour before. The only word that would be passed from the lookout was when the schooner was first sighted, nothing more. There was no word passed from the man on the lookout after that. Vessels are usually sighted from the bridge before they are reported by the man on the lookout.

45 Q. Please state particularly in what stage of going about the schooner was, when you first observed her.

A. My impression is that her sails were just lifting, her head sheets

had just been let go, and the other sails were about lifting. By lifting I mean that which takes place between the full and shaking.

Q. How long does it take your ship to stop when she is going ten to eleven knots.

A. That I am not prepared to say; I could not say; I should have to go out here and try it; I should say certainly, I think, inside of five minutes.

Q. Then when the schooner undertook to go about, you had not time to stop her before the collision?

A. We had not time to stop the steamer before we got to the place opposite the place where the schooner was when she tacked.

Q. What was to prevent you from putting your wheel hard-a-starboard, and keeping out and passing the schooner under her stern?

A. The intervening space was too small.

Q. Would the same difficulty occur if you had gone on with your wheel hard-a-port?

A. There was too short a space to prevent a collision by porting a wheel.

Q. Then I understand you to say that the short distance that lay between your steamer and the schooner, when the schooner attempted to go about, made the collision inevitable?

A. In my judgment it did.

Re-re-examined:

I did not see anything in the conduct of the pilot that required my interference as captain. I had every confidence in him. I took him down with me.

46 The lookout man is not now on the ship.

J. W. SHACKFORD.

Sworn to and subscribed before me this 26th day of April A. D. 1875.

[SEAL.] JOHN RODGERS,
Notary Public.

SAMUEL V. HOFFMAN, being duly sworn, deposes and says:

I was the first assistant engineer of the Illinois, and in charge of the watch at the time of the collision. 60 to 61 is full head of steam. As near as I can recollect the steam-gauge showed about 56 on this occasion on the river. The entries on the log-book show the average for the watch.

I noticed the shock of the collision.

The entries in that log are made by Mr. Hand, chief engineer, from the log-slate. I made the entries on the log-slate.

The clock is in the engine-room. (Look at the entries of March 3d, 1875—last entries under the head of remarks.)

(Mr. Coulston objects to this witness testifying as to entries in the log.)

The following words and figures are taken from my slate:

"Slowed at 9.25
"Full speed 9.36
"Stopped 9.38

"Went ahead a few turns slow, then stopped and backed full speed."

The rest is not taken from entries made by me.

(Log offered in evidence. See Appendix A.)

I was at the engine.

47 Q. You say, "Went ahead a few turns slow." How many turns did you make?

A. I did not count the turns. The only way I could get at it would be to guess. About 5 or 6 turns—I don't think it was over six. I continued at the throttle after the collision. I mean at the reverse engine—our engine is not managed by a throttle exactly, but by a reverse engine.

Q. Do you know whether the entries are a correct copy of the entries made by you on the slate?

(Objected to.)

A. I could not swear dead sure that they are correct, but to the best of my recollection they are correct. The slate is wiped off after being copied into the log-book.

Q. Independently of any entries in the log-book, state all that was done by you at the engine room within 10 or 15 minutes previously to the collision.

A. Within 10 minutes, any way, I was in the working gallery; the engine was going ahead full speed. When the bell rung to stop I was standing close to the handle of the reverse engine; I stopped the engine. The engine was stopped a very short while, couldn't exactly say how long, when the bell rung to go ahead, slow; went ahead a few turns, then stopped and went back full speed for two minutes; during that two minutes the collision occurred, I suppose—I felt the shock. Then we stopped backing and went ahead a few turns again. Then we kept stopping and backing and going ahead for a few turns for about 15 or 20 minutes. Then after that we went ahead full speed until we got up close to New Castle.

Cross-examined:

The captain keeps the log of distances, and it is entered on the engineer's log by the captain.

I have been on the Illinois since she was fitted out at Cramp's yard.

48 At sea, where there is no tide, under right favorable circumstances, the Illinois will make 13 knots an hour. She makes the fastest average time of any vessel on the line.

The writing desk, with slate on it, is on the after part of the engine-room.

Some of these entries were first made on the bulk-head with a pencil, right by the reverse engine. It is customary when the engine stops and backs to note the time right down, so that if anything occurs we have the time.

S. Y. HOFFMAN.

Sworn to and subscribed this 27th day of April, A. D. 1875.

[SEAL.] JOHN RODGERS,
Notary Public.

GEORGE E. SAWYER, being duly sworn, deposes and says:

I was third officer of the Illinois at the time of collision. I had charge of the wheel in the wheel-house forward, which is one step down from the bridge.

There was three men and a quartermaster at the wheel besides myself. I know Dan Baker buoy. This collision occurred about a mile above Dan Baker buoy.

The orders was given to me first to go 'round Dan buoy, to port the wheel; then steady; then I heard the captain and the pilot talking

together about this schooner, that they would go to the eastward of her, and they said to me put your wheel to port. I put the wheel to port to go to the eastward of her, and then they said steady again. Then either the captain or pilot, I am not certain which, said, "She is going to tack, we will have to go westward of her." Then they sung out to me to put the wheel hard-a-starboard. I put the wheel just as hard a-starboard as five of us could heave it over. The captain
49 slowed the ship at the time—I heard the bells ring. The captain struck the bell himself; then he sung out to me to give her full speed back. The captain had stopped the ship and rung to go back when he sung out to me to ring full speed back.

She struck the schooner. Then I was told to clear away boat No 3, and I went alongside the schooner with boat No. 3 and took the captain and two men off.

I did not see the schooner when the captain said she was going to tack. I didn't see her until after she had got in stays and her head was to the eastward. There was sleet on the pilot-house windows. I was steering by the compass, attending to my vessel.

I hadn't seen the schooner before until I heard them talking about her.

I wasn't looking for her. My business is to steer the ship as they tell me, and to note the time of passing buoys in the scrap log.

All the bells ring on the bridge except the speed bells. All the bells ring from the pilot-house.

Cross examined by Mr. COULSTON:

When the captain told me to give her full speed back, to the best of my knowledge the schooner was about 150 yards off.

From the time we put our wheel hard-a-starboard until the collision occurred, we kept it so; we did not change it.

Starboarding the wheel when going ahead slow threw our head to the west, and when we gave her full speed back, that threw her head to the eastward with a starboard wheel.

Re-examined:

Q. Would the effect of Geo. E. Sawyer starboarding the helm with the engine reversed at full speed have a tendency to throw the vessel's head to the eastward as long as the vessel was actually going forward through the water?

50 A. I never saw her act that way on board a ship yet when she was moving ahead.

Q. When would starboarding the wheel have that effect—of throwing the vessel's head to the eastward going up the river?

A. The ship must be going ahead through the water in order that starboarding the helm should throw the head to the westward.

Q. You say when we gave her full speed back, that threw her head to the eastward with a starboard-wheel, would it have that effect as long as the ship was going forward although the engine was reversed?

A. I don't think it would; to my best knowledge, I have never seen her act that way.

Q. If the ship was actually moving backwards, what would be the effect of starboarding the wheel?

A. It would move the ship's head to starboard.

Recross:

A big ship like the Illinois is very hard to manage in quick manœuvres, is she not?

A. Yes, sir.

Q. She requires a good deal of room, does she not?

A. Yes, sir.

Q. When going at full speed she runs a long distance before you can stop her by reversing at full speed, does she not?

A. Yes, sir.

Q. The question is not what a vessel might do, but what the Illinois did do on this occasion. With your wheel hard-a starboard, and the engine reversing at full speed, did not the steamer stop going to port and head a little to starboard—I mean before the collision?

A. Yes, sir.

Q. How many seconds before the collision did your steamer's head go to starboard?

51 A. To the best of my knowledge, it was between 3 and 4 minutes. I mean, when the order was given to hard-a-starboard we did so, and the ship's head went to port; when the order was given to reverse at full speed, as soon as the ship stopped, or began to stop, going forward, her head went to the eastward.

GEO. E. SAWYER.

It wants a good 4 men at the wheel in making quick manœuvres—hard-a-starboard or hard-a-port—and when we are going ahead and the engine is reversed full speed you have to watch your wheel, or the change would throw the men over.

At sea we have 2 men and quartermaster at the wheel in ordinary weather; in bay or harbor we have 3 and a quartermaster.

GEO. E. SAWYER.

Sworn to before me and subscribed this 27th day of April, A. D. 1875.

[SEAL.] JOHN RODGERS,
Notary Public.

WILLIAM M. HEARD, being duly sworn, deposes and says:

I was the fourth officer at time of collision, in charge of the lead; was standing under the bridge, with the quartermaster, on the starboard side. I did not take any notice of the schooner until the captain gave the order to let go the anchor. My whole attention was taken up with the lead when that order was given. I ran forward as fast as I could; by the time I got to the forecastle, the chief boatswain was there and let go the anchor. The schooner was then heading over to the eastern shore, when the anchor was let go. I suppose she was about 25 feet off, to the best of my knowledge; the anchor was on the bottom, and about 20 fathom of chain out, before the collision.

52 I think she was less distance from the steamer than across Walnut street from this office—416 Walnut street.

No cross-examination.

WM. M. HEARD.

Sworn to before me and subscribed this 27th day of April, A. D. 1875.

[SEAL.] JOHN RODGERS,
Notary Public.

JAMES H. HAND, being duly sworn, deposes and says:

I was chief engineer of the Illinois at the time of collision.

When the collision took place I think I was standing on the skylight, over the engine-room, a little aft of amidships.

I saw the schooner's sails first over our port bow, about one-half way

up her sails; could not see her hull. I saw the schooner so near us that there was danger of a collision, and I started to go down into the engine-room.

The engine-room is 2 flights of stairs from the spar-deck.

I don't recollect feeling the blow.

When I got down, the engines were backing at full speed. After stopping backing, I went on deck again to where I had been before.

I remained on deck some 20 minutes.

Entries of March 3d, 1875, of engineer's log, S. S. "Illinois" shown witness. He says:

That is in my handwriting; it is copied from the log-slate.

It is copied from the log-slate down to, "Backing full speed 3 minutes."

(Mr. Coulston objects to this testimony as contradictory of testimony of first assistant engineer.)

That is all exactly as it was on the log-slate, except, I think, the log-slate read, "2 or 3 minutes."

53 Q. The words "Then stopped and started ahead a few turns and stopped," were taken from what?

A. From hearing the bells ring when I was over the skylight; when I went on deck the second time.

The collision had then occurred.

The going ahead again was for the purpose of going up against the schooner to get the crew off. They climbed up their rigging to get off. When the engine stopped reversing we had backed off from the vessel, and we started a few turns to go up against her gently.

The collision had occurred before we stopped reversing at full spoed.

The average of steam revolutions are made by me.

At sea we average very regularly; in the rivers not so regularly. At sea we average every hour; in rivers every 4 hours.

Cross-examined by Mr. COULSTON:

I think I made the entries in that log that night when we were at anchor. The captain was not by at the time.

Q. What was your reason when you made the entry as to back full speed, that you altered from the slate when you came to make up your log?

A. I don't know why, except to make less writing; 2 or 3 minutes was rather indefinite, so I filled it out 3 minutes.

Q. Please tell us what erasure you made in your log, where you have written min.

A. I don't remember what it was. I don't remember scratching anything out there at all. I have no other memorandum of the number of minutes that we stopped and backed full speed on our engine.

Q. Then when you say that the slate contained the entry from 2 to 3 minutes, that is from your recollection only?

A. Yes, sir.

Q. Are you in the habit when you make entries in your log, which you make from the slate, of changing the entries on the slate?

54 A. No, sir; I'm not.

Q. Do you swear that there was any entry on the slate, as to the number of minutes that you backed full speed?

A. To the best of my recollection there was.

Q. Are you so certain that you can swear positively?

A. Yes, I think I can swear positively.

Mr. Hoffman kept the slate from 8 to 12 on the morning of the collis-

ion. I say my entry is wrong as to the words, "came into collision." That word should be the collision happened while we were backing full speed. The word should have been after the word speed, or during the time we were backing full speed.

I did not know of my own knowledge that the anchor was down. I had heard that it had been let go.

I couldn't say whether the anchor was taken or tripped before we backed out of the schooner after the collision.

Q. If the anchor was down, are you not mistaken in saying that you backed and then went forward after the collision?

A. No, sir.

JAMES H. HAND.

Sworn to before me and subscribed this 27th day of April, A. D. 1875.
[SEAL.] JOHN RODGERS,
Notary Public.

Afterwards, on the eleventh day of June, 1875, J. Warren Coulston, esq., proctor and advocate for the libellant, moves the court for an order directing that the depositions of Daniel C. Boyer and William J. Mineford, taken in the suit of Daniel C. Boyer against the schooner Ellen Holgate, U. S. D. C. in admiralty, district of Delaware, be filed and read in evidence on the further argument of this cause without the further production of said witnesses on the part of the libellant.

55 And upon the same day, the court refuses to grant the application.

Afterwards, on the 18th day of June, 1875, Joseph Mason, esq., is appointed a commissioner to take the depositions of witnesses.

Afterwards, the further depositions taken on behalf of the libellant by the said commissioner, Joseph Mason, esq., are read and heard, and the same being filed on the 23d day of December, 1876, are in the words following:

In the district court of the United States for the eastern district of Pennsylvania. In admiralty. 1875. No. 13. Collision.

JOSEPH GOLDING, MASTER AND PART OWNER of the schooner Ellen Holgate,
vs.
THE STEAMSHIP ILLINOIS.

1875, JUNE 18TH, 10 A. M.

Mr. Coulston for libellant.
Messrs. Edmunds and Henry for respondent.

DANIEL C. BOYER, a witness called on behalf of the libellant, being duly sworn, was examined by Mr. Coulston, as follows:

Q. Did you see the collision between the schooner Holgate and steamship Illinois?

A. Yes, sir.

Q. Where were you at the time?

A. I was right at the stern of the schooner on the tug-boat Col. S. L. Brown. I was master of that tug.

Q. Were you right astern of the schooner at the time of the collision?

56 A. Yes, sir.

Q. Did you see the schooner go about?
A. I did.
Q. How far were you astern of the schooner when she went about?
A. I was right close to her stern.
Q. And the steamer, at that time, where was she?
A. I didn't take notice of the steamer.
Q. Was she astern?
A. She was astern of my boat.
Q. Can you tell how far?
A. No, sir; because I didn't see her.
Q. Did you hear her?
A. No, sir; I didn't hear her.
Q. Now, can you tell why the schooner went about?
A. The schooner went about—she went in as close to the ice as she could get, and went about.
Q. Where was this ice that she went about from?
A. In towards—from Reedy Island. The wind was from the eastward.
Q. Where was your tug as to the schooner and the ice—were you between, on a parallel line?
A. I was between the schooner and the ice.
Q. How far, as near as you can tell, was the ice from the schooner at the time she went about?
A. That I couldn't tell—how close it was.
By the COURT. Can you tell whether in front or aside?
A. It was in front of her when she first went about.

Mr. COULSTON:

Q. Can you give us some idea—one hundred, one hundred and fifty, two hundred yards?
A. I don't think it was over twenty-five yards from the schooner's bow when she went about.
Q. What kind of a day was it?
57 A. It was a very bad day; hailing and blowing, and the wind was from the eastward, and the tide was ebb.
Q. How much ebb?
A. It hadn't been running down very long.

Cross-examined by Mr. EDMUNDS:

Q. You were examined at Wilmington in another branch of the case in which you are claimant?
A. Yes, sir.
Q. Did you not, in that examination, testify that you were two hundred yards off of the schooner when she went about?
A. No, sir.
(It is suggested by the court that the witness be shown the record of his testimony, which was done.)
Q. Read that. Didn't you testify, "I came up about fifteen or twenty minutes after the schooner sunk." You said that?
A. I did.
Q. "When the collision occurred I was about two hundred yards off."
A. Yes; when the collision occurred.
Q. When the collision occurred you were two hundred yards off?
A. Yes.
Q. Had you passed the steamship Illinois that morning?
A. No, sir.
Q. Which side of her were you, eastward or westward?

A. I was right ahead of her.
Q. Which side of the schooner were you when she went about?
A. I was to the westward of her.
Q. How far to the westward of the schooner were you when she went about?
A. I was close to the stern; close enough to talk to the captain.
58 What did you do after the schooner went about?
A. I run right off to the westward and laid there until the collision occurred.
Q. How far off to the westward did you run?
A. I couldn't tell how far, because the schooner was sailing away from me and I was sailing away from her.
Q. Can you say fifty or one hundred yards?
A. I couldn't tell you how far.
Q. Ten feet.
A. Yes.
Q. Twenty feet?
A. I can't say?
Q. You know whether you went half a mile?
A. I don't know, because I didn't take notice.
Q. Were you going ahead under both bells?
A. No, sir; under one bell—sheered her hard off.
Q. Starboard helm?
A. Yes, sir.
Q. What was the object of your going to the westward and waiting?
A. My object was to look at the collision.
Q. Then when the schooner went about you knew there was to be a collision?
A. After she went about I thought there would be a collision, the way the steamer was going. That was the only reason I called my men on deck and told them to look.
Q. How long did you lay to the westward; this place where you went; until after the collision was over?
A. Yes, sir.
Q. Then from the position in which you lay your head was to the westward?
A. Yes, sir.
Q. Your stern to the eastward?
A. Stern right down the river—right up and down the river.
59 Q. Laying there, was your tug damaged any by the ice?
A. No, sir.
Q. You were not afraid of the ice?
A. No, sir; if I was I wouldn't have been out in it.
Q. There were plenty of sailing vessels out in that ice?
A. No, sir; there wasn't but one sailing vessel in it that I seen that day. The Holgate was the only vessel sailing in the ice.
Q. Weren't you doing any towing at that time?
A. No, sir.
Q. I don't mean at that particular moment, but have you ever said that you were making two hundred dollars a day towing?
A. Yes, sir; not then; before that time.
Q. How far to the westward of the steamer were you when the collision took place?
A. To the westward of her?
Q. Yes.
A. I don't know exactly how far; two hundred yards. I know that

we were that far off, because I was looking then—I was looking ahead after the schooner went about. I was looking ahead, getting out of the way, so that I could look at the collision.

Q. What was the character of the ice that you speak of?

A. Some of it was big cakes, some small, where it had been broken up.

Q. It was broken ice?

A. Yes, sir.

Q. What do you call that kind of ice?

A. It had been drifting up and down the river; cakes got broken up, some large and some small.

By the COURT:

Q. How large was the largest?

A. Some as wide as the river at that time. Where the schooner
60 went in there was plenty of ice; some pretty good-sized cakes—enough to take her ashore—ten and twenty feet square. The tug-boat couldn't have gone through. There was no ice where I was; no ice from the position in which I viewed this collision.

Q. And none while you lay there?

A. No, sir; none. I lay right at the edge of the ice, on the outside.

Q. It was settling down to the westward—easterly winds?

A. Yes, sir.

Q. That is, the longer you lay there the further away it got from you?

A. No, sir; it kept coming down from above, and got heavier. After the collision took place there was plenty of ice in the channel.

Q. That was after the vessel had been sunk—run over?

A. Yes, sir; that came right down in the channel.

Q. Was there any ice between you and the schooner, where you lay; I mean between where you went over and lay?

A. No, sir; at the time of the collision, from the place where I lay to the point of the collision was clear water. I was two hundred yards from the point where the collision occurred.

Q. How near to you above, up the river, was the ice while you lay there, I mean; not what was to the westward?

A. The ice wasn't bothering me at that time, but after we went alongside of the schooner I wasn't taking notice of the ice. At the time I got alongside of the schooner the ice had got down from above; had broken her jib-boom and top-mast. There was plenty of ice about.

Q. How long was that after the collision?

A. I suppose it wasn't over a half an hour; that ice was coming down from above.

Q. But at the time of the collision where you were laying; you say it was clear water between where you were laying and the collision?

61 A. Yes, sir; not in the channel; there was plenty of ice to the leeward.

Q. Where was the tugboat Young America when the schooner went about?

A. Astern of the steamship.

Q. How far to the leeward of the steamship was the schooner when she went about?

A. I don't know. I didn't take notice. I didn't look back at the steamer when she went about.

Q. After she did go about, how far to the leeward was she—the steamer?

A. I don't think she was any to the leeward. After the schooner went about, the steamer was right astern.

Q. Did the schooner make more than one attempt to go about?

A. No, sir.

Q. Did you see her luff any before she went about?

A. No, sir; I seen her when she went about. I was following her.

Q. You say when the schooner went about, you were talking with the captain?

A. No, sir; I said I was close enough to talk to him.

Q. Then, if you were that close to the schooner and to the leeward of her, if the steamer had attempted to clear the schooner by going to leeward of her, there would have been danger of running into you?

A. I would have gotten out of the way. I had a steamboat.

By Mr. HENRY:

Q. To direct your attention to where you first commenced—I understand I may be wrong now—I recollect that you were a little to the leeward, left-hand side of the schooner when she went about?

A. Yes, sir; I was right under her stern.

Q. How far astern?

A. I was close enough to talk to the captain. I couldn't tell you exactly how close.

62 Q. Take it by the length of your boat.

A. We were not the length of our boat—just about the length of our boat; no further than that. My boat is seventy-six feet long.

Q. When she went about, you starboarded your helm and went to the left, according to your account?

A. Yes, sir. I stopped my boat and was going to talk to the captain; looked behind; seen the steamer coming; rang one bell; went off a little way, and then stopped.

Q. And you were still in clear water?

A. I was.

Q. And the ice was still further, if anything, to the leeward of you?

A. I went right close to the ice, on the outside.

Q. How soon after the schooner went about did the collision occur? How far did the schooner go on her port tack?

A. I can't tell. She was two hundred yards away from us. I think she must have gone two hundred yards. My boat didn't go far. I just started her ahead, so that I could sheer her off. I couldn't get very far on account of the ice. My statement is that the schooner went two hundred yards on her port tack before she went down.

Q. That you unhesitatingly say. She ran in the neighborhood of two hundred yards on the port tack before she was struck?

A. Port-tack?—starboard—run to the eastward; yes, sir.

Q. And the ice which came down on that schooner wasn't the ice which was to your leeward?

A. No, sir; that wasn't the ice on my leeward.

Q. Were you not further up the river, above the schooner—further up the river at the time of the collision?

A. I was; yes, sir; above, upward; above the schooner when the collision took place. She went about. Tide was ebb and the wind down, and she sided down a good bit.

Mr. EDMUNDS:

63 Q. Have you had any conversation with the captain of the Holgate in reference to matters connected with this collision?

A. In reference to matters? I don't understand. What matters?

Q. Have you had any conversation with the captain of the Ellen Holgate in reference to the cause of the collision?

A. No, sir; I never talked to him.

Q. Did the captain of the Holgate, at any time subsequent to the collision, say to you or in your hearing, that he alone was at fault in reference to the collision? You may confine your answer to the time of the collision.

A. He never said anything like that to me, or in my hearing.

Q. What is the name of the owner of your vessel?

A. Mr. Churchman.

Q. Did you ever tell your owner, Mr. Churchman, that he had?

A. No, sir; I did not.

Q. Or anything like it?

A. When the captain first came aboard of my boat, he said he couldn't blame anybody, and that is what I told the owner of the boat.

Q. Did he say why he did not blame anybody?

A. No, sir; he never said why he didn't, or anything of the kind. The man didn't know what he was saying for a week afterwards.

Q. Explain in your own way what you mean by "he didn't know what he was saying for a week afterwards."

A. The man was worried so; I don't know what else. He appeared to be heart-sick all the time. He was not able to get around for a day or two after the collision.

Q. You claim that he made a contract with you to save that vessel for $2,000; that it was done under a contract made that or the subsequent day?

A. Yes, sir.

64 Q. The schooner would have made Reedy Island piers on the course she was standing before she went about?

A. No, sir; she would not.

Q. Where would she have hit?

A. Right below Reedy Island light-house, if she had kept on.

Q. How far is Reedy Island light-house below the piers?

A. To the best of my belief, it is half a mile below the piers; it may be more or less.

Q. Do you know whether it is a mile and a half or half a mile?

A. No, sir; I do not.

Q. Reedy Island light is to the westward of the piers?

A. Yes, sir.

Q. According to your view, what was the comparative course between the schooner and the steamer?

A. The course was south after she went about.

Q. What was the schooner's course as compared with the steamer, before the schooner went about?

A. I don't know, sir.

Q. Were they sailing on parallel lines, or approaching parallel lines, before the schooner went about?

A. I don't know, sir; I didn't look astern.

Q. And you say positively that that schooner would not have made Reedy Island piers, but would have come about Reedy Island light-house?

A. That is the way she was heading.

Q. Above or below?

A. Below the light-house.

Q. Then would you say that the schooner was standing up the river?

A. No, sir; she was not.

Q. Before she went about?

A. Before she went about.

Q. She was standing across the river to the westward?

65 A. Yes, sir.

Q. And you feel confident as to the testimony you have given?

A. Yes, sir.

Q. If she had been standing up the river for Reedy Island piers, the ice would not have been ahead of her?

A. No, sir; the ice would have been ahead of her standing for the piers; it would have been ahead of her because the ice was outside the piers.

Q. If that vessel had been standing up the river for Reedy Island piers, the ice would not have been twenty-five yards from her?

A. The ice was not over 25 yards from her bow on the starboard side; that is, if she was standing for Reedy Island piers, the ice then would be on her starboard side, heading up the river.

Q. If she had been heading up, the ice would have been on her starboard side?

A. Yes, sir.

Q. There would have been no ice on her port side?

A. No, sir; it was all to the westward.

Q. I wish you would think over that again, sir. If the schooner had been standing up the river, heading for Reedy Island piers, would the ice have been 25 feet from her when she went about?

A. I cannot answer that question, because I don't know far the schooner would have been off the shore. If she had been the same distance off, heading straight up the river, the ice would not have been more than 25 yards off, on the starboard side, going up, if she had been 25 yards up. When I say starboard side, I mean port side.

Q. How long have you followed the water, sir?

A. 14 years; I have had charge of a boat 8 years.

Q. Which tack was the schooner on before she went about?

A. I can't tell you; I have nothing to do with sailing vessels at all; I am a tug-boat man.

66 Q. You say she was not standing up the river. She was standing across the river, somewhat to the Delaware shore?

A. Yes, sir.

Q. The vessel was not standing up the river in any sense of the word?

A. No, sir.

Q. She was not standing for Reedy Island piers?

A. No, sir.

Q. She was standing for a point below the light-house?

A. Yes, sir.

Q. And your testimony is that she went about, sailing in that direction, with the ice 25 yards ahead of her.

A. I say just before she went about, the ice was 25 yards ahead of her.

Q. If the vessel had been standing for Reedy Island piers, the ice would have been 25 yards off her port bow, and not 25 yards ahead of her?

A. It would have been ahead of her, too, because the ice was outside the piers.

Q. It would not have been 25 yards off?

A. Yes, sir; easy.

Re-examined by Mr. COULSTON:

Q. Taking the ice where it was at the time the schooner went about, if the schooner had been heading for the piers instead of the light, would or would not the ice have been ahead of her?

A. Yes, sir; it would.

By Mr. HENRY:

Q. How far off ahead?

A. I can't tell how far off. It would have been ahead, because the ice was outside the piers.

Q. Would it have been 25 yards off, or more?

A. Yes, sir.

By Mr. EDMUNDS:

67 Q. Would it not have been more than 25 yards ahead of her?

A. Yes, sir; on the starboard side, but on the port side about the same.

By Mr. COULSTON:

Q. But taking the ice where it was when the schooner went about, whether she had been heading for the piers or the light, the ice would have been still ahead of the schooner's bow?

A. Yes, sir.

By Mr. HENRY:

Q. How fast was the schooner going at the time she went about?

A. She was going pretty fast.

Q. When she went about?

A. Yes, sir.

Q. She had not luffed previously to going about?

A. I don't think she had.

WILLIAM J. MINEFORD, having been duly sworn, was examined by Mr. Coulston, as follows:

Q. You were master of what tug?

A. Of the Young America.

Q. Did you see this collision?

A. Yes, sir.

Q. Where were you?

A. On my own boat, right astern of the steamer, or a little to the leeward.

Q. Did you see the schooner go in stays?

A. Yes, sir.

Q. Did you see her when she first went in stays?

A. Yes, sir.

Q. What was the first movement of the schooner that you noticed, that showed you she was going about?

A. I saw her shaking and putting off, and going about.

68 Q. Did she go about fast or slow?

A. Kind of slowly.

Q. What makes you say that?

A. Well, because she shook loosely with the wind; she didn't come around and go right off in a minute.

Q. Did you observe anything that looked like mis-stay?

A. No, sir.

Q. When the schooner was in stays, going about, how far was the steamer off from the schooner, to the best of your judgment?

A. I judge about a mile or under; about that distance. The schooner was up the river a little to the left of the ship. She was a long distance above her when she went about—a little to the left of the steamer—pretty near a line.

Q. How close were you to the steamer in a line from the schooner to the steamer?

A. I was within 400 or 500 yards of the steamer.

Q. Why did the schooner go about?

A. I suppose the schooner went about for the ice. He could not fetch his course in further, for the ice, owing to the way the wind was.

Q. How far was the ice from the schooner's bow at the time she went about?

A. It looked to be quite close under the schooner's leebow or ahead of her.

Q. How wide was this ice from where the schooner went about over to a line with Reedy Island?

A. I judge it occupied the whole inside channel, and was coming down outside of the island. I mean floating ice.

Q. Was this ice that she went about for a large field or broken ice?

A. I can't tell, but the river was full of large and small ice.

Q. From the line where the schooner went about, was the ice occupying the river from that line over to Reedy Island piers?

69 A. Yes, sir; all that shore was occupied.

Q. How far was it across this ice, as near as you could tell?

A. I can't tell that; I can tell on the chart. It occupied, outside of Reedy Island, some considerable distance—on the inside and outside.

Q. How broad was this field of ice—a quarter or half a mile?

A. It was more than that.

Q. I mean from the line of this chart. (Chart shown witness.)

A. The river was full of ice from where the schooner went about, all the way over to the Delaware shore.

Q. After the schooner went about, did you see the steamer, or did the steamer change her course?

A. I saw when the schooner went about, and I saw the schooner going about. By and by I saw the steamer back. I started up towards the collision, and then stopped and called the men out to look at it. It pretty near struck me, and I went around out of the way.

Q. How far off from the schooner was the steamer when you saw that she was backing?

A. She was a good distance above when the steamer commenced to back. She was above her, a little to the west of her.

Q. If the steamer had kept on with a starboard wheel when you first saw the schooner in stays, could she or could she not have passed under the schooner's stern without a collision?

A. I can't say exactly; but I judge if they were watching her manœuvres, and the steamer had not an eastern sheer on her, they could have cleared.

Q. By the starboard wheel?

A. Well, the ship, when she came around, she caught at her wheel and headed up, edging a little to the eastward. Just before this

70 collision she ported her wheel up the river. When the schooner tacked she stopped and backed ship right away, I suppose. I looked at the steamer just after the schooner tacked, and I saw she was backing.

Q. Well, you don't know whether she could have passed or not?

A. It all depends whether they saw the schooner at the moment she tacked or not. The ship had lately inclined going up the channel more easterly when she tacked.

Q. Did you see the steamer going to the westward at all from the time the schooner tacked until the collision occurred?

A. No, sir; I couldn't see that she sheered any to the westward. She appeared to go straight ahead. When the steamer backed she

didn't pay off any. She appeared to hold her course. Being a long vessel I could not see so well. If it had been a short vessel I would have seen it.

Cross-examined by Mr. HENRY:

Q. Did you not state in your examination-in-chief that as the steamer came round Dan Baker Shoal she carried a port helm?

A. Yes, sir; she ported her helm coming round Dan Baker, but she had eased up her course, and had just cleverly got straightened when the schooner tacked.

Q. Did you not say that as soon as you saw the schooner tacking you saw the steamer was backing?

A. Just in a minute afterwards I saw the schooner tacking on her course. I looked at the schooner when she was tacking, then I looked at the ship about a minute or so afterwards, and I saw that the ship was backing.

Q. Was that your statement when you were examined in chief, which the commissioner failed to get down?

A. What I had reference to was that just a minnte before there was a point shoal which the steamer came round, and she headed up her course and had just got straightened when the schooner tacked. The steamer had just had a port wheel on her a few minutes before that and had just got straight.

71 Q. Did not the captain during the time that you were getting the schooner out of the ice, when she was sunk, state that the collision was owing to his fault?

A. No, sir; he did not. I asked him some questions in regard to the matter. I asked him if he were at the wheel himself, and such questions as that. He said yes, he was. He said nobody was to blame but himself. That is what he told me, but he didn't say it was his fault with regards to the collision. We were talking frequently during the day, and he said it was like throwing good money after bad to sue the company, and he would have to see how it was first and see his owners. He said he didn't know how the schooner was hurt, and he would have to make the best of it he could, and see what they say. That is all the talk I have had with him.

By Mr. EDMUNDS:

Q. At the time the collision happened was your boat round Dan Baker?

A. Yes, sir.

Q. How far above Dan Baker Shoals were you?

A. About half a mile, just close above. I don't know the exact distance.

Q. And the steamer was about 450 or 500 yards above you?

A. I couldn't measure the distance. She was just a short distance. I had spoke the ship below Dan Baker. I just followed her right up, and a few minutes afterwards the thing occurred.

Q. And you were right astern of the steamer?

A. Yes, sir; a little on the port side.

Q. That is to say you were between the schooner and the Delaware shore, astern?

A. No, sir; I was in a line with the schooner. I laid on an angle between the schooner and the steamer, the steamer being on my right hand and the schooner on my left.

Q. You say the distance from you to the schooner was about a mile?

72 A. Yes, sir; I judge it was about a mile. I couldn't say exactly.

Q. You could see what was under the bow of the schooner from that distance?

A. I could not see exactly, but it looked as though the ice was right close under her lee bow, and a little ahead of her.

Q. You saw the collision take place?

A. Yes, sir; I was looking right at it.

Q. How long after the schooner went about did the collision take place?

A. That I can't say exactly, but it was not long—just a short time—I couldn't say—four or five minutes, somewhere along there, a short time. I won't specify the time, because I took no note of it.

Q. Were the schooner and the steamer upon the same course?

A. No, sir; the ship was headed about north-by-east, the steamer about north-by-west, northwest-by north, or something. I judge somewheres about that. I didn't set the compass on her, but I judge she was on that course.

Q. Did you stop your boat at the time of the collision?

A. Yes, sir; I stopped to look at it. I waited to see where they were. I had an idea it was going to be a pretty close shave, because if the schooner had gone a minute longer she would have cleared the ship. We judged it was going to be a narrow escape.

Q. After the collision you steamed ahead?

A. Yes, sir.

Q. Upon which side of the steamer did you go?

A. I went on the starboard side the steamer; went above her and came down head on the schooner.

Q. Where was the Brown then?

A. She was just a little above her to the westward. She was just above the steamer. She was above me.

Q. And she was farther to the westward than you were?

73 A. I couldn't say exactly that. I rounded to her, and I came down between the Brown and the ship and spoke to somebody on the steamer.

Q. How far, when you came down in the manner in which you have stated, was the Brown—was the Brown to the westward of her?

A. I can't say. I was looking at the collision to see if anybody was hurt, and I was taking no notice of the Brown.

Q. Then you cannot approximate the distance the Brown was to the westward of you at that time?

A. No, sir; I cannot, because——

Q. But she was to the westward of you?

A. Yes, sir; I rounded to the eastward of her.

Q. How far up above the schooner did you go before you came down?

A. I cannot tell. I went far enough so as I could handle my boat and come down without running into anybody.

Q. How far above the point where you turned round to come down was the ice?

A. I couldn't see any ice up above; it was to the westward driving down along that shore.

Q. How far to the westward of you was the ice when you turned round to come down?

A. I couldn't say; it was from that line along the edge of the western channel where she was.

Q. How far?

A. 500 yards, and more too.

Q. Then I understand you that from the point where you turned round to come down, the ice was 500 yards or may be more to the westward of you?

A. Yes, sir; it appeared to be about that. I can't tell exactly.

Q. Did you see any ice in the river above you when you turned round?

A. No, sir; I didn't take notice.

74 Q. From where you were before the collision, was there any ice to the westward of you there?

A. Yes, sir; there was ice to the westward all down that shore as far as I could see.

Q. Then was not this line of ice an unbroken line all the way down from Reedy Island piers right down to Dan Baker? Was it any further off to the westward where you were than it was up above where the collision occurred?

A. No, sir; I couldn't tell exactly that. The ice was ragged, and goes in fields.

Q. It was not driving in a pack to the westward?

A. No, sir; it was running ice. Ice will pack till it jams.

Q. Have you any positive knowledge of the character of the ice that you say was in the neighborhood of the schooner when she went about?

A. The character of the ice was going down that shore; it appeared to be. The ice was going down the river; at that time it would not let a tug-boat go through; it would have to go round it. A tug-boat, you know, can go round ice. It was not new-made ice.

Q. It was broken pieces of ice?

A. Broken cakes and large. It occupied the whole river soon afterwards.

Q. Did you notice where the Brown was laying when you went up round and rounded?

A. No, sir; I didn't notice.

Q. You didn't notice whether there was any ice in her neighborhood?

A. I didn't notice.

Q. Did you notice whether she was in the ice?

A. No, sir; she was not that I could see.

Q. Has any one connected with this case forbidden you to speak to the counsel of the respondents, or any one representing the respondents in this case, which means the persons connected with the steamship company?

75 A. No, sir.

Q. Have you yourself objected to giving any information on this collision under instructions?

A. Down at Wilmington you called me to one side in the room and asked me a few questions there, and I told you I did not feel inclined to answer any questions there; that I came down there about our own case.

Q. And you have had no interview with any one else since that time in reference to the case?

A. No, sir; I have not spoken to any one at all in regards to the collision.

Q. Do you recollect saying in that interview that after you got your money you could give some information to the steamship company that would be of great service?

A. No, sir; I didn't. You asked me if I could give any information with regard to what the captain said. I told you no; if you wanted to

know anything from me you would have to subpœna me and get me before the court, and I would tell you what I knew about the case; that I didn't want to have anything to say with regard to the collision at all.

Q. Was this after Mr. Coulston forbid you to speak to me?

A. No, sir; he never did forbid me. Mr. Coulston asked me what you had said to me, but I told him just exactly as I tell you now.

Q. Was Mr. Coulston in the room when you said this to me?

A. We didn't go there for that business, and I didn't want to have anything to say about it.

And afterwards, on the 2d day of July, A. D. 1875, the report of the assessors, with the opinion of the court and decree condemning the said steamship, is filed, being in the words following:

76 To the honorable John Cadwalader, judge of the district court of the United States for the eastern district of Pennsylvania:

SCHOONER ELLEN HOLGATE *vs.* STEAMSHIP ILLINOIS. } In admiralty. Collision.

The undersigned, assessors in the above cause, having given careful attention to the testimony and arguments of counsel, respectfully present: That, on March 3d, 1875, the steamer Illinois, in coming up the Delaware Bay, had rounded Dan Baker's Shoal with the port wheel, and had "straightened" up in about mid-channel.

The schooner Ellen Holgate was some distance ahead, a little on the port bow of the steamer, bound to New Castle, Delaware. The wind was from northeastward; the schooner was by the wind, heading about north-by-west, or north-northwest, and "pointing" for Reedy Island piers. The schooner tacked to the eastward, to avoid ice ahead of, and close under, her bow. There was ice on the western or Reedy Island side, while the eastern side was clear of obstruction. The Illinois was coming up, under steam alone, at a good rate of speed, or about ten knots. Immediately after the schooner had tacked, and before she had gone any considerable distance, the Illinois and Holgate collided, the point of contact being just abaft the main rigging of the schooner, causing her to sink and capsize.

We present the above as a fair statement of the case, and proceed to give our views as to which vessel was in fault, and why:

The Illinois, on rounding the Dan Baker's Shoal, ported the wheel to give the schooner a "little more room," and then "straightened
77 up" about north-by-east, the regular channel course, and in about mid-channel, going at a good rate of speed, say 9 or 10 knots. (This porting the wheel to give the schooner a "little more room" seems to be an admission on the steamer's side that there was a possibility of coming in close proximity to the schooner.) Now, had the steamer held the "port wheel" for a few minutes only, there would have been no collision, as the distance required to clear the schooner with the port wheel would not have been more than 75 feet.

When the schooner tacked a short consultation between the captain and pilot of the steamer determined them to go under the schooner's stern, and this was about the only alternative then left them. To carry out this the wheel was put "hard a-starboard," the bell rung to stop and back "full speed," but the "propeller," acting in concert with the rudder, threw the steamer's head rapidly to starboard, thereby frustrating

the action of the starboard wheel (which was to turn the bow to port), and consequently preventing the proper intention of the steamer to go under the schooner's stern, which would have required about 25 feet to have cleared the schooner altogether. It may be remarked that when the bell to "go a-stern" was rung the anchor was let go, but without any apparent result.

That the steamer did all that could be done at the "moment of peril" does not admit of a doubt, but we submit that she did not do it soon enough. Our opinion in this is made stronger by a point urged by respondent that the schooner tacked right under the steamer's bow. Now, adopt this "hypothesis," and the answer is very simple, what business had the steamer in such close proximity to the schooner at that critical moment, when, by porting the wheel, "slowing," or "stopping" say 5 minutes before the schooner tacked, would no doubt have carried the steamer one to two hundred feet to the eastward, and consequently entirely clear of the schooner.

Had the steamer, on rounding Dan Baker, with a full view of the surroundings, and the knowledge that the vessel a-stern "must look
78 for and keep clear of the vessel ahead," using a wise discretion with a seaman's prompt forethought, calculating the chances of going ahead of the schooner with the port wheel, or of going a-stern with the starboard wheel, any collision would certainly have been avoided.

Again, "porting" the wheel after having rounded Dan Baker, or even say 300 yards below the schooner, an almost unappreciable movement of the wheel would have occasioned so small a deviation of the course that the compass would scarcely have recorded the same.

That the captain of the schooner was censurable in not making himself acquainted with what was around him is undoubtedly correct, but, as the approaching vessel was a-stern, with the entire channel and his motive power at command, bound by rules of navigation which have been in existence perhaps centuries "to look out for and keep clear of the vessel ahead," the necessity for keeping a "lookout a-stern" does not to the nautical mind seem imperative.

We, therefore, entertaining the views as expressed above, have no hesitation in declaring that the steamer Illinois is wholly in fault in not electing in time to port or starboard, to slow, stop, or back; and also in not giving any signal, by whistle or otherwise, to indicate her approach to the schooner.

Respectfully submitted.

JOHN H. YOUNG.
GEO. N. HEWITT.

PHILAD'A, *June 26th*, 1875.

79 The Illinois, at suit of the master of the Ellen Howgate.

1875, JUNE 29th.

By the court:

The only difficulty of the court has arisen from the fact that when the schooner tacked to the eastward, the steamer was not sighted from the schooner.

That, on tacking, there should have been a lookout astern from the schooner is unquestionable. The expression of the assessors that "the necessity for keeping a lookout astern does not, to the nautical mind, seem imperative," would, therefore, if unexplained, be liable to just

verbal criticism. But, as the assessors distinctly inform the court, their opinion is, that if the steamer had been sighted, the schooner might nevertheless have properly made the tack as and when she made it, and the steamer could and ought then to have cleared her without difficulty.

Their report thus explained is adopted by the court.

Decree condemning the Illinois with costs.

80 Afterwards, on the 19th day of December, 1876, a final decree for the libellant intervening petitioner is entered, being in the words following, to wit:

U. S. D. C. In admiralty.

JOSEPH GOLDING, MASTER AND PART OWNER, etc., of schooner Ellen Holgate, libellants,
vs.
STEAMSHIP ILLINOIS, JOHN W. SHACKFORD, master, respondent.

And now, to wit, this nineteenth day of December, 1876, on presentation of the report of Geo. P. Rich, esq., commissioner to assess damages, and after hearing the arguments of the respective proctors, it is ordered and decreed that the said report be confirmed, and that the libellants, the owners of the said schooner, do recover from the said respondent, John W. Shackford, and his stipulator, Henry D. Welsh, the sum of eight thousand one hundred and five dollars and fifty-six cents ($8,105\frac{56}{100}$); that the libellant, Joseph Golding, do recover from the said respondent, John W. Shackford, and his stipulator, Henry D. Welsh, the sum of four hundred and forty-seven dollars and twenty-two cents ($447\frac{22}{100}$); that the libellant, Edward Nelson Sapp, do recover from the said respondent, John W. Shackford, and his stipulator, Henry D. Welsh, the sum of sixteen dollars and sixty-two cents ($16\frac{62}{100}$).

The said sums aggregating the sum of eight thousand five hundred and sixty-nine dollars and forty cents ($8,569\frac{40}{100}$), and that said libellants further recover full costs.

81 Afterwards, on the 22d day of December, 1876, Morton P. Henry, esquire, proctor for the respondent, prays leave to appeal from the decree aforesaid to the next circuit court of the United States for the eastern district of Pennsylvania, in the third circuit. And the same is allowed upon the usual conditions.

UNITED STATES,
Eastern District of Pennsylvania, ss:

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify the foregoing to be a true and faithful copy of the record and proceedings of the said district court in a certain plea civil and maritime for damages sur collision therein lately depending, wherein Joseph Golding, master and part owner of the schooner Ellen Holgate, is the libellant, against the steamship Illinois and the American Steamship Company, of Philadelphia, respondent.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Philadelphia, this 2d day of February, A. D.

1877, and in one hundred and first year of the Independence of the said United States.

AARON S. SWARTZ,
Pro Clerk U. S. District Court.

81*a* APPENDIX A.

Engineer's log of steamship Illinois on voyage No. 10 from Liverpool to Philadelphia.

WEDNESDAY, *the 3rd day of March*, 1875.

Engineers on watch.	Remarks.
M. McCarty	Fine weather, moderate breeze on starboard bow, moderate swell on port beam, engine and boilers working well.
S. S. Baker	Same as previous watch.
S. V. Hoffman	Moderate breeze on starboard beam, smooth sea, passed lightship at 10.40, engines and boilers working well.
M. McCarty	Stopped & started several times and came to anchor at 1.15 for a pilot, up anchor and started ahead at 3.05, stopped and anchored again at 3.50, everything working well.
81*b*	
S. S. Baker	Up anchor and started ahead at 6.00 a. m., full speed at 6.15, slowed at 6.40, full speed at 6.48, slowed 7.28, full speed 7.38, everything working well.
S. V. Hoffman	Slowed at 9.25, full speed 9.36, stopped at 9.38, went ahead a few turns slow, then stopped and started ahead a few turns and stopped, came in collision with a vessel and sunk her, stopping and starting remainder of watch on account of ice.

JAMES H. HAND,
Chief Engineer.

81*c* Copy may be appended to the record with the same effect as if the original was produced; right reserved to refer to original.
MORTON P. HENRY.

82 And afterwards, to wit, on the 15th day of October, A. D. 1877, the cause came on for argument, and the same having been fully argued by the proctors for the respective parties, the court held the same under advisement.

And afterwards, to wit, on the 30th day of April, A. D. 1878, the court, by McKennan, circuit judge, delivered an opinion and statement of facts, which said opinion and statement, being read, is as follows, to wit:

83 *Statement of facts found by the court.*

Circuit court of U. S., eastern district of Pennsylvania.

THE SCHOONER ELLEN HOLGATE, LIBELLANT and appellee,
vs.
THE STEAMER ILLINOIS, RESPONDENT AND APPELLANT.

Appeal from the decree of the district court. In admiralty.

MCKENNAN, Circuit J.

On the 13th of March, 1875, the steamship Illinois, a large vessel,

about 360 feet in length, and of about 3,000 tons register, was coming up the Delaware Bay, at a speed of about ten knots an hour, and had rounded Dan Baker's shoal with the port-wheel, and had "straightened up" in about mid-channel. She was preceded by the schooner Ellen Holgate, a little on the port bow of the steamer, bound to New Castle, Delaware.

The wind was from the northeastward; the schooner was by the wind heading about north by west, or north-northwest, and "pointing" for Reedy Island piers.

The vessels were moving upon slightly diverging lines, which were about one hundred yards apart.

The western or Reedy Island side of the bay was obstructed by ice, while the eastern side was free from such obstruction.

When the vessels were probably three or four hundred yards apart, the schooner went into stays, and then tacked to the eastward to avoid the ice, which was ahead of and close under the port bow.

There was no lookout astern on the schooner, and, until after she had changed her course, no one on board of her observed the steamer.

On the steamer there was a sufficient lookout, the master and pilot were on the bridge looking ahead and saw the schooner some time before she tacked, and so directed the steamer's course that she would pass the schooner on the latter's starboard side and some three hundred feet away from her, if she had kept on her original course.

As soon as the manœuvre of the schooner was observed on the steamer, orders were given to put her helm hard a-starboard, to stop her engine, then to back at full speed and let go the anchor, with a view to pass under the schooner's stern. But these orders were ineffectual to prevent the collision, the steamer striking the schooner just abaft the main rigging, causing her to sink and capsize.

Opinion.

It is the duty of a vessel overtaking another to keep clear of the vessel ahead; and this duty is especially imperative upon a steamer, which has the control of her own motive power, and can therefore more promptly and accurately govern her own movements. Hence she must carefully observe the course and conditions of the vessel in advance of her, and, in view of these, adapt her own rate of speed and line of movement to the avoidance of danger of collision with such vessel; and if a collision occurs she is regarded as prima facie in fault, unless it appears to have been inevitable. But the preceding vessel is not without correlative obligations. She is bound to maintain a proper lookout, to keep her course, and not to change it, at a time and under circumstances which would involve danger of collision with a vessel approaching from either direction, except under the pressure of an imminent greater peril.

Now, it is apparent that if both vessels had kept their course, the collision complained of could not have occurred. The steamer would then have given the schooner so wide a berth in passing her as to involve no risk of collision.

The steamer did not violate her duty to keep out of the schooner's way, in adopting and pursuing a line of movement which was, in the first instance, attended with no danger to either of them, but was only rendered unsafe by a change of the schooner's course. She had a right to assume that the schooner would keep her course, or, at least, would not attempt to change it when the vessels were in such close proximity to each other as to create a peril which could not otherwise

exist. As was said by Mr. Justice Strong, in The Scotia, 14 Wall., 181: "Nor is a steamer called to act, except when she is approaching a vessel in such direction as to involve risk of collision. She is required to take no precautions when there is no apparent danger." While, therefore, the steamer selected a line of movement, which seemed to be, and really was, safe for both vessels, she might rightfully follow it, and was not called upon to act further in the way of precaution, "until danger of collision should have been apprehended." And when this danger became imminent—not by any act of hers—such precautions were promptly taken by her as seem to have been adapted to the emergency. In the moment of peril she did all that could be done to avert it, or to mitigate its consequences. Under such circumstances no fault is imputable to her, unless the schooner had an absolute right to change her course, as she did, and the steamer was bound to anticipate it.

However rigidly a steamer is, and ought to be, held to the duty of keeping out of the way of a sailing vessel which she is approaching, it is only justly enforceable by regarding the conduct of both vessels, in its contributory connection, with the emergency in which the steamer is suddenly called upon to act. The ultimate test of the steamer's liability is, whether, under subsisting conditions, she did anything which she ought not to have done, or omitted any precaution which she ought to have taken. Accordingly it was determined in The Scotia, supra, that where a steamer and a sailing vessel were approaching each other, and the steamer took a course which would carry her at a safe distance, in passing, from that apparently pursued by the other, and the latter changed her direction and a collision resulted, the steamer was not responsible, when she had not "failed to adopt such precautions as were in her power, and were necessary to avoid a collision," as soon as that peril arose. Why should a different rule of accountability be applied, when the only difference in the circumstances consists in this, that both vessels were proceeding in the same direction, and the steamer sought to go ahead of the sailing vessel? A steamer may rightfully avail herself of the superior speed which she derives from her special motive power; and, if she keeps a proper lookout, and, in view of the apparent course of the vessel ahead of her, takes a direction unattended with risk of collision, does she not, in this regard, observe all the precaution which the law exacts from her?

But it was argued that the tacking of the schooner was rendered necessary by the ice, and that this necessity ought to have been perceived by the steamer, and her movements have been determined accordingly.

It is fully proved that there was a sufficient lookout on the steamer; that the master and pilot were on the bridge looking ahead, that the movements of the schooner were carefully noted, and that no immediate necessity for a change of the schooner's course was discerned by those in charge of the steamer. It is difficult to determine how near the schooner was to the field of ice when she tacked. None of the witnesses, who were on board of her, state the distance. That a change in her course was necessary to avoid it is undoubted, but whether she was in such close proximity to it as to make such change imperative at the time when it was made, does not satisfactorily appear from the libellant's proofs. It did not seem so to those on board the steamer, for, as her master testified "the water was clear for a mile ahead, and a quarter to a half mile to leeward;" and the testimony of the other witnesses for the respondent is not inconsistent with this aspect of the situation. With a sufficient lookout, then, on the steamer, if no imme-

diate necessity for the schooner's going about was observed by those engaged in this duty, as is fairly inferrible from the proofs, negligence is not predicable of the steamer's failure to anticipate the schooner's variation. We must, therefore, seek elsewhere for the fault which the collision involved. I think it resulted from the unquestionable negligence of the schooner.

It is evident that the steamer was not seen by the schooner until the latter had changed her course. The testimony of her captain is decisive on this point. He says "I first discovered the steamer after our vessel filled off and started ahead," and the steamer was then at a distance of, "I should think, between two and three hundred yards somewhere." This ignorance of the proximity of the steamer was, doubtless, the result of a failure of observation. Although, while the schooner kept her course, this omission was excusable, because it would have been harmless, yet it is undeniable that when she was about to change her course she was bound to look out astern, so as to avoid peril to herself or others, if the surrounding circumstances might induce an apprehension of it. Can it be doubted that she would not have executed such a movement if she had observed the steamer when she resolved upon it? It would have been apparent to her, as it was to all others who were in the vicinity at the time, that to tack then was either recklessly to invite a collision or to increase the immediate danger of it. By executing it a few minutes before she did, she could have crossed the course of the steamer with entire safety, or by holding her luff for a minute or two longer the steamer could have passed her without risk of injury to either. Pretermitting, however, the precaution she was bound to observe, she put herself in the way of the steamer at a time when the latter could not avoid her, and thus rendered the collision inevitable. She, therefore, is alone responsible, and so all the libels must be dismissed, with costs.

85 And afterwards, to wit, on the day and year last aforesaid, the court order a decree to be entered in favor of the appellants; which said decree being filed is in the words following, to wit:

GOLDING
vs.
STEAMSHIP ILLINOIS.

And now, April 30, 1878, this cause having been heard and argued by the respective proctors of the libellant and the respondent, it is ordered and considered that the libel filed in this cause and all interve-
86 ning petitions be dismissed, the respondents to recover costs in this court and also the costs in the district court.

By the court.

(Endorsed:) 2 April sess., 1877. C. C. U. S., E. D. of Pa. Golding et al vs. Steamship Illinois. Decree entered April 30, 1878.

87 Whereupon the proctor for the libellant presented and filed a bill of exceptions as follows, to wit:

Bill of exceptions.

Be it remembered that at the sessions of April, A. D. 1878, in the circuit court of the United States for the eastern district of Pennsylvania,

came Joseph Golding, master and part owner of the schooner Ellen Holgate, on his own behalf and behalf of the other owners of the said schooner, and exhibited his libel and complaint (prout libel) against the steamship Illinois whereof J. W. Shackford is master, in a cause of collision, civil and maritime, and thereupon the said J. W. Shack-
88 ford presented and filed an answer to the said libel and complaint (prout answer) and thereupon issue was joined between said parties libellants and respondent.

And afterwards, to wit, at a session of said court held at Philadelphia before the honorable William McKennan, judge of said court, on the fifteenth day of October, A. D. 1877, the cause came on for argument, at which day came as well the said libellant as the said respondent, by their respective proctors and advocates, and upon the argument of the cause the proctor and advocate of the libellant, to maintain the libel and issue on the part of the libellant, offered in evidence and read the depo-
89 sitions on behalf of the libellant, to wit, Edward Nelson Sapp, Benjamin Waters, Edward Josephs, Joseph Golding, Daniel C. Boyer, and William J. Minford (prout depositions of libellant.)

And upon the argument of the cause the proctors and advocates of the respondent, to maintain the answer and issue on the part of the respondent, offered and read in evidence the depositions on behalf of respondent, to wit, Edward Maule, John W. Shackford, Samuel V. Hoffman, George E. Sawyer, William M. Heard, and James H. Hand (prout same.)

And the said cause having been fully argued as aforesaid, the court held the same under advisement.

90 And afterwards, to wit, on the 30th day of April, A. D. 1878, the court delivered an opinion, which said opinion was preceded by a statement of facts, and which said statement of facts and opinion are in the words and figures following, to wit:

Statement of facts found by the court.

Circuit court of U. S., eastern district of Pennsylvania.

THE SCHOONER ELLEN HOLGATE, LIBELLANT AND appellee,
vs.
THE STEAMER ILLINOIS, RESPONDENT AND APPELlant.

Appeal from the decree of the district court. In admiralty.

MCKENNAN, Circuit J.

On the 13th of March, 1875, the steamship Illinois, a large vessel, about 360 feet in length, and of about 3,000 tons register, was coming up the Delaware Bay, at a speed of about ten knots an hour, and had rounded Dan Baker's shoal with the port-wheel, and had "straightened up" in about mid-channel. She was preceded by the schooner Ellen Holgate, a little on the port bow of the steamer, bound to New Castle, Delaware.

The wind was from the northeastward; the schooner was by the wind heading about north by west, or north-northwest, and "pointing" for Reedy Island piers.

The vessels were moving upon slightly diverging lines, which were about one hundred yards apart.

The western or Reedy Island side of the bay was obstructed by ice, while the eastern side was free from such obstruction.

91 When the vessels were probably three or four hundred yards apart, the schooner went into stays, and then tacked to the eastward to avoid the ice, which was ahead of and close under the port bow.

There was no lookout astern on the schooner, and, until after she had changed her course, no one on board of her observed the steamer.

On the steamer there was a sufficient lookout, the master and pilot were on the bridge looking ahead and saw the schooner some time before she tacked, and so directed the steamer's course that she would pass the schooner on the latter's starboard side and some three hundred feet away from her, if she had kept on her original course.

As soon as the manœuvre of the schooner was observed on the steamer, orders were given to put her helm hard a-starboard, to stop her engine, then to back at full speed and let go the anchor, with a view to pass under the schooner's stern. But these orders were ineffectual to prevent the collision, the steamer striking the schooner just abaft the main rigging, causing her to sink and capsize.

Opinion.

It is the duty of a vessel overtaking another to keep clear of the vessel ahead; and this duty is especially imperative upon a steamer, which has the control of her own motive power, and can therefore more promptly and accurately govern her own movements. Hence she must carefully observe the course and conditions of the vessel in advance of her, and, in view of these, adapt her own rate of speed and line of movement to the avoidance of danger of collision with such vessel; and if a collision occurs she is regarded as prima facie in fault, unless it appears to have been inevitable. But the preceding vessel is not without correlative obligations. She is bound to maintain a proper lookout, to keep her course, and not to change it, at a time and under circumstances which would involve danger of collision with a vessel approaching from either direction, except under the pressure of an imminent greater peril.

Now, it is apparent that if both vessels had kept their course, the collision complained of could not have occurred. The steamer would then have given the schooner so wide a berth in passing her as to involve no risk of collision.

92 The steamer did not violate her duty to keep out of the schooner's way, in adopting and pursuing a line of movement which was, in the first instance, attended with no danger to either of them, but was only rendered unsafe by a change of the schooner's course. She had a right to assume that the schooner would keep her course, or, at least, would not attempt to change it when the vessels were in such close proximity to each other as to create a peril which could not otherwise exist. As was said by Mr. Justice Strong, in the Scotia, 14 Wall., 181: "Nor is a steamer called to act, except when she is approaching a vessel in such direction as to involve risk of collision. She is required to take no precautions when there is no apparent danger." While, therefore, the steamer selected a line of movement, which seemed to be, and really was, safe for both vessels, she might rightfully follow it, and was not called upon to act further in the way of precaution, "until danger of collision should have been apprehended." And when this danger

became imminent—not by any act of hers—such precautions were promptly taken by her as seem to have been adapted to the emergency. In the moment of peril she did all that could be done to avert it, or to mitigate its consequences. Under such circumstances no fault is imputable to her, unless the schooner had an absolute right to change her course, as she did, and the steamer was bound to anticipate it.

However rigidly a steamer is, and ought to be, held to the duty of keeping out of the way of a sailing vessel which she is approaching, it is only justly enforcible by regarding the conduct of both vessels, in its contributory connection, with the emergency in which the steamer is suddenly called upon to act. The ultimate test of the steamer's liability is, whether, under subsisting conditions, she did anything which she ought not to have done, or omitted any precaution which she ought to have taken. Accordingly it was determined in the Scotia, supra, that where a steamer and a sailing vessel were approaching each other, and the steamer took a course which would carry her at a safe distance, in passing, from that apparently pursued by the other, and the latter changed her direction and a collision resulted, the steamer was not responsible, when she had not "failed to adopt such precautions as were in her power, and were necessary to avoid a collision," as soon as that peril arose. Why should a different rule of accountability be ap-
93 plied, when the only difference in the circumstances consists in this, that both vessels were proceeding in the same direction, and the steamer sought to go ahead of the sailing vessel? A steamer may rightfully avail herself of the superior speed which she derives from her special motive power; and, if she keeps a proper lookout, and, in view of the apparent course of the vessel ahead of her, takes a direction unattended with risk of collision, does she not, in this regard, observe all the precaution which the law exacts from her?

But it was argued that the tacking of the schooner was rendered necessary by the ice, and that this necessity ought to have been perceived by the steamer and her movements have been determined accordingly.

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It is evident that the steamer was not seen by the schooner until the latter had changed her course. The testimony of her captain is decisive on this point. He says, "I first discovered the steamer after our vessel

filled off and started ahead," and the steamer was then at a dis-
94 tance of, "I should think between two and three hundred yards somewhere." This ignorance of the proximity of the steamer was, doubtless, the result of a failure of observation. Although while the schooner kept her course, this omission was excusable, because it would have been harmless, yet it is undeniable that, when she was about to change her course, she was bound to look out astern so as to avoid peril to herself or others, if the surrounding circumstances might induce an apprehension of it. Can it be doubted that she would not have executed such a movement if she had observed the steamer when she resolved upon it? It would have been apparent to her, as it was to all others who were in the vicinity at the time, that to tack then was either recklessly to invite a collision, or to increase the immediate danger of it. By executing it a few minutes before she did, she could have crossed the course of the steamer with entire safety, or by holding her luff for a minute or two longer the steamer could have passed her without risk of injury to either. Pretermitting, however, the precautions she was bound to observe, she put herself in the way of the steamer, at a time when the latter could not avoid her, and thus rendered the collision inevitable. She therefore is alone responsible, and so all the libels must be dismissed with costs.

95 And thereupon the proctor and advocate for the libellant, Joseph Golding, did then and there except to the aforesaid opinion of the said court, and the said proctor and advocate for the libellant, Joseph Golding, etc., did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge, at the request of the said proctor and advocate for said libellant, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this thirtieth day of April, A. D. 1878.

W. McKENNAN, [SEAL.]
Cir. Judge.

96 And afterwards, to wit, on the 28th day of June, A. D. 1878, the libellant, by his proctor, comes into open court here and prays an appeal to the Supreme Court of the United States, which said appeal is allowed, in the words following to wit:

U. S. C. C. in admiralty.

GOLDING ET AL., OWNERS OF SCH'R ELLEN Holgate,
vs.
STEAMSHIP ILLINOIS.

And now, to wit, this 28th day of June, 1878, comes J. Warren Coulston, proctor and advocate for the libellants and moves an appeal
97 from the decree of the court in above case, and thereupon the appeal is allowed sec. reg., security in $1,000.

(Endorsed:) No. 2, April sess., 1877. C. C. U. S. E. D. of Pa. Golding et al. vs. S. S. Illinois. Appeal allowed. Entered June 28, 1878.

98 And afterwards, to wit, on the 28th day of June, A. D. 1878, the appellant, by his proctor, comes into court here and files his

bond on appeal, which said bond being read is in the words following to wit:

In the circuit court of the United States for the eastern district of Pennsylvania. April session, 1877. No. 2.

JOSEPH GOLDING ET AL., OWNERS OF SCH'R Ellen Holgate,
vs.
THE STEAMSHIP ILLINOIS, AND JOHN W. Shackford, master.

99 Know all men by these presents that we, John A. J. Sheets, one of the owners of the schooner Ellen Holgate, as principal, and Charles H. Martin, and Charles S. French, are held and firmly bound unto The American Steamship Company, of Philadelphia, owners of the steamship Illinois in the sum of one thousand dollars, to be paid to the said The American Steamship Company of Philadelphia, their successors or assigns, to which payment well and truly to be made we do hereby bind ourselves, and each of us, our and each of our heirs, execu-
100 tors and administrators, jointly and severally firmly by these presents. Sealed with our seals, dated this 28th day of June, A. D. 1878.

Whereas the above named Joseph Golding et al., owners of sch'r Ellen Holgate have presented an appeal to the Supreme Court of the United States from the decree of the circuit court of the United States for the eastern district of Pennsylvania in the above-entitled suit:

Now, the condition of this obligation is such that if the above-named Golding et al., owners of the sch'r Ellen Holgate, shall prosecute their appeal with effect and answer all damages and costs if they shall
101 fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JNO. A. J. SHEETS. [L. S.]
CHAS. H. MARTIN. [L. S.]
CHAS. S. FRENCH. [L. S.]

Sealed and delivered in the presence of us—
SAMUEL BELL.
W'AM A. WILLIAMSON.

Approved 28th June, 1878.

JOHN CADWALADER,
Judge.

(Endorsed:) No 2, April sess., 1877. C. C. U. S. E. D. of Pa., Golding et al. vs. S. S. Illinois. Bond sur appeal. Filed June 28, 1878.

102 THE UNITED STATES OF AMERICA, *ss:*

To the steamship Illinois and John W. Shackford, master, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein Joseph Golding, master and part owner of the schooner Ellen Holgate, and Edward Nelson Sapp, steward on board said schooner, are appellants, and you are appellees, to

show cause, if any there be, why the decree rendered against said appellants as in said appeal mentioned shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 28th day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

JOHN CADWALADER,
Judge.

102½ I hereby accept service of the within writ for the steamer Illinois and John W. Shackford, master, and request the clerk to enter our appearance for them.

June 29, 1878.

MORTON P. HENRY,
P'r H. R. E.
HENRY R. EDMUNDS.

103 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, Samuel Bell, clerk, do hereby certify the foregoing to be a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a certain appeal therein lately depending between Joseph Golding, master and part owner of the schooner Ellen Holgate, and the steamship Illinois, whereof John W. Shackford is master.

In testimony whereof I have hereunto subscribed my name and
104 affixed the seal of the said circuit court, at Philadelphia, this tenth day of October, A. D. 1878, and in the 103d year of the Independence of the said United States.

[SEAL.]

SAMUEL BELL,
Clerk Circuit Court.

(Indorsement on cover:) No. 275. Joseph Golding, master, &c., of the schooner Ellen Holgate, appellants, vs. The steamship Illinois, J. W. Shackford, master, The American Steamship Co., claimant. E. Pennsylvania C. C. U. S. Filed 15th October, 1878.